THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

GW Competition & Innovation Lab Working Paper Series

No. 2024/27

Rethinking the As-Efficient Competitor Test: Assessing the wider impact of the CJEU's Judgment in Unilever and its Implications in Shaping the European Commission's Agenda to Reform Article 102 TFEU

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Abstract

Recently, the European Commission published a communication indicating amendments to its Article 102 TFEU Guidance Paper in light of the latest EU Courts' judgments on exclusionary abuses. In the Amended Guidance and the Policy Brief, the Commission provides some guidance related to changes in four main areas: the anti-competitive foreclosure definition, the as efficient competitor (AEC) test, the assessment of loyalty rebates, treatment of refusals to supply and margin squeezes. The analysis in this article reflects on the evolution of the application of the AEC test, focused on the most recent CJEU judgment in *Unilever Italia*. The article discusses the extent to which the Competition Authorities must examine economic evidence submitted by the dominant company, and whether they can be refuted without in-depth analysis. The paper concludes that further clarification is imperative regarding outstanding ambiguities surrounding the appropriate role and use of the AEC price-cost test in assessing potentially abusive conduct under Article 102 TFEU.

I. Introduction

The application of the AEC test has sparked considerable debate in scholarship and policy discussions since its introduction by the European Commission in its Article 102 Guidance Paper in 2008 and especially after its application in the *Intel* case in 2009.[2] This debate arises from the fact that the EU courts have supported this test when it comes to examining pricing practices under Article 102 TFEU (for example *TeliaSonera, Deutsche Telekom, Post Danmark I*).[3] They rejected its application in cases involving anti-competitive behaviours that are

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[2] Intel (Case COMP/37.990) Commission Decision [2009] OJ C227/13 (hereinafter Commission Decision).

[3] Case C 52/09 *Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-527; Case C 280/08 P Deutsche Telekom v Commission [2010] ECR I-955; Case C-209/10 Post Danmark A/S v Koncurrenceradet [2012] ECR I-172 (hereinafter Post Danmark I).*

unrelated to pricing (such as the 2014 GC judgment in *Intel,* the CJEU judgment in *Post Danmark II,* the GC judgment *in the Google Shopping*)[4]. It annulled the Commission's decisions in the *Google Android* and *Qualcomm* cases largely for procedural reasons, considering the application of the AEC test to be erroneous.[5] The CJEU judgment in *Intel* from 2017 does not provide much clarification regarding the application of the AEC test.[6] The Court only considered that the Commission is required to analyse all the circumstances and to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[7] However, the CJEU did not clarify whether in the evaluation of a strategy aiming to exclude an as efficient competitor, a price-cost test is required, or it has to be considered because the Commission decided to apply it and Intel raised it as a defence. What was rejected or disputed in the cases above was the application of the AEC price-cost test – still an outstanding issue since its first application by the Commission in the *Intel* case. The principle that Art. 102 TFEU is only concerned about the exclusion of equally efficient rivals stands.[8] In this regard, it is now accepted that the AEC test should be interpreted as a conceptual principle; whereas the price-cost test is only one type of evidence to verify a possible exclusionary abuse.[9] This position, although not clearly expressed by the Court, is the position of the European Commission as it can be seen in its Amended Guidance Paper published in March 2023.

The latest judgment related to the application of the AEC price-cost test by the CJEU is the preliminary ruling in *Unilever Italia* that appears to reaffirm the CJEU's position from *Intel*.[10] The CJEU clarified that exclusivity clauses imposed by a dominant company don't automatically constitute an abuse of dominance under EU law. Instead, competition authorities must apply the criteria established in *Intel* to assess potential anti-competitive effects. The CJEU emphasized the need for competition authorities to evaluate the economic analysis

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[4] *Case T-286/09 Intel v Commission [2014] ECR II-547(*hereinafter the 2014 GC judgment); Case C-23/14 *Post Danmark A/S v Konkurrenceradet* (*Post Danmark II*); Case T-612/17 - *Google and Alphabet v Commission* (Google Shopping).

[5] Case T-235/18 *Qualcomm v. Commission* and Case T-604/18 *Google and Alphabet v. Commission* (Google Android) (pending appeals).

[6] Case C-413/14 *Intel v Commission* [2017] ECR I-632 (hereinafter CJEU judgment).

[7] CJEU judgment, para 139.

[8] Miroslava Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' no. 2 (2022), European Papers-A Journal on Law and Integration, 627.

[9]According to K. U. Kühn & M. Marinova, The Role of the 'As Efficient Competitor' Test after the CJEU Judgment in Intel, 4(2) Competition L. & Pol'y Deb. 64 (2018), the AEC test should be interpreted as a concept, not as a formal price-cost test.'; See in general Miroslava Marinova, *Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test* (Wolters Kluwer 2018).

[10] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, 19 January 2023 (hereinafter *Unilever*).

provided by the dominant company. However, it did not provide specific guidance on the applicability of the AEC price-cost test in cases of exclusionary abuse. The position of the CJEU suggests that competition authorities are obligated to address the AEC price-cost test, either by accepting its application or rejecting it when presented by the dominant company. Given that dominant companies will presumably always present economic evidence asserting that the examined conduct is not anti-competitive, the application/consideration of the AEC price-cost test becomes an inevitable element in all abuse of dominance cases.[11]

However, following the preliminary ruling in *Unilever*, on July 11, 2023, the Italian Supreme Administrative Court (the 'Court') upheld the fine imposed by the Italian Competition Authority (the 'ICA') and categorically rejected the economic analysis submitted by Unilever and the application of the AEC price-cost test in particular. This decision is revolutionary as the Court decision seems to contradict the position of the CJEU according to which, firstly, the AEC price-cost test although not an indispensable part of the assessment of exclusionary abuses can, in principle, be relevant for all types of exclusionary abuse cases and, secondly, the Competition Authority must evaluate and take into consideration the economic analysis produced by the dominant company.

This position raises the question as to the extent to which the competition authorities must examine economic evidence submitted by the dominant company, and whether they can be refuted without in-depth analysis. Some commentators even considered that although the position of the Italian top Court is difficult to be reconciled with the preliminary ruling of the CJEU, it seems '*consistent with recent efforts to limit the scope and relevance of the AEC test because such a test would make enforcement in Article 102 cases "too difficult".*'[12]

The CJEU judgment in *Unilever* and the way the Italian court interpreted the ruling shows that there are still many open questions and uncertainties regarding the application of the AEC test which might lead to even greater legal uncertainty and to the competition authorities of the Member States of the European Union using different approaches.[13]

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[11] The same position can be found at https://competitionlawblog.kluwercompetitionlaw.com/2023/01/27/eu-court-of-justice-confirms-that-the-intel-effects-based-approach-applies-to-exclusive-dealing-and-clarifies-the-narrow-circumstances-under-which-the-conduct-of-distributors-can-engage-the-liability/

[12] VBB on Competition Law | Volume 2023, NO7 & 8, 5 September 2023, <https://www.vbb.com/media/Newsletters/VBB_on_Competition_Law_Volume_2023_Nos._7__8.pdf > accessed 18 September 2023.

[13] Legal certainty is 'one of the most important general principles recognised by the European Court', See e.g. Trevor Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (OUP USA, 2010) 142.

This might be challenging for the Commission in its preparation of the new Guidelines on the application of Art.102 that are expected to be issued in 2025. The European Commission has to reflect the recent case law but at the same time, it must provide a clear guidance on the application of the AEC price-cost test in exclusionary abuse cases in order to minimise enforcement errors and to limit the administrative cost and delay associated with a detailed price-cost analysis in cases in which it is not relevant.

In light of these considerations, this article seeks to assess the conceptual framework and application of the AEC test within the decisional practices of the European Commission and EU Courts. The analysis extends to elucidate the stance taken by the Italian Court in the *Unilever Italia* case. Ultimately, it attempts to clarify the conditions under which the AEC test, specifically in terms of the price-cost test, should be applied. Furthermore, the article endeavours to provide recommendations for the European Commission as it moves forward with its initiative to issue new Article 102 TFEU Guidelines, ensuring a cohesive application of EU competition law rules across Member States.

This paper is formed by five sections including this introduction. The second section of this article discusses the meaning of the concept of the effects-based approach, the AEC test and its role in the so called more economic approach to Art. 102. The third section discusses the evolution of the application of the AEC test from the decisional practice of the European Commission and EU Courts. The fourth section discusses the Italian Competition Authority Unilever case along with the appeal decision, the preliminary ruling delivered by the CJEU, and the final decision adopted by the Italian Court in an attempt to understand the firm position of the Italian Court and what motivates its rejection of the economic evidence and the AEC test in particular submitted by the dominant company. The fifth section provides some suggestions for the way forward in the reform of Article 102 and concludes.

II. The concept of the effects-based approach and the role of the AEC test

As a way of clarification, this section will start with summarising the origins of the AEC test, the meaning of the notion effects-based approach in EU competition law and the role of the AEC test in particular. This is because the AEC test has been conflated for a very long time with a price-cost test, which is one type of evidence to verify a possible exclusionary abuse.[14]

[14] For full blown analysis about the difference between the price cost test and the as efficient competitor test as a concept see Miroslava Marinova, *Fidelity Rebates in Competition Law: Application of the 'As Efficient*

Then, this section will explain the difference between the predation price-cost test and the Commission's modified price-cost test applicable to conditional rebates and finally will summarise the economic theories of exclusion in order to explain the inapplicability of the modified price-cost test in cases of fidelity rebates and exclusive dealing cases.

2.1 The AEC test – origin and context

The origins of the AEC test can be traced back to the principles of the Chicago School.[15] The theorists from this school argued that competition would be harmed only when the observed conduct excludes an equally or more efficient competitor.[16] This foundational idea 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 a 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. If a dominant company had to set prices not at the level of their costs (marginal costs) but at the level of the less efficient competitor's cost, this would protect competitors who are less efficient and would artificially raise prices. For that reason, Posner claimed that 'it would be absurd to require the firm to hold a price umbrella over less efficient entrants.'[17] It was this effect that Robert Bork described as the paradox of antitrust enforcement.[18]

Posner originally proposed the AEC test for the evaluation of predatory pricing.[19] According to him, a conduct should be prohibited as a predation if the dominant firm's pricing is below its short-run marginal cost or '*below long-run marginal cost with the intent to exclude a competitor*.'[20] Posner's proposal could be seen as 'the basis of the rule of reason approach, for

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Competitor' Test (Wolters Kluwer 2018) and Miroslava Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' no. 2 (2022), European Papers-A Journal on Law and Integration, 627. Recently, this has been the established interpretation in the academic literature and policy speeches. However, this important clarification has not been confirmed by the EU Courts at the time of the writing of this paper.

[15] Richard Posner, 'The Chicago School of antitrust analysis' (1979) 127(4) University of Pennsylvania Law Review 925.

[16] Jonathan Jacobson, 'Exclusive dealing, Foreclosure, and Consumer Harm' (2002) 70(2) Antitrust Law Journal 311, 346.

[17] Richard Posner, *Antitrust Law: An Economic Perspective* (2nd edn, University of Chicago Press 2009).

[18] Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (The Tree Press 1993).

[19] Richard Posner, 'Exclusionary Practices and the Antitrust Laws' (1974) 41(3) The University of Chicago Law Review 506.

[20] Ibid, 519.

which a business practice is not '*per se*' illegal, but can be justified if it does not harm consumers or if it creates efficiency.'[21] In a similar vein, when elaborating the standard for the evaluation of predatory pricing, Areeda and Turner focused on pricing below average variable cost, because this '*has the effect of destroying an equally efficient rival*.'[22] The general presumption behind the test is that pricing above average variable cost should be presumed lawful because 'the low price at or above average cost is competition on the merits and excludes only less efficient rivals.'[23] Areeda and Turner considered the evidence of profit sacrifice as a sufficient condition for liability. This conclusion assumes that firms that are equally or more efficient than the dominant firm can compete on the merits on the basis of pricing above average variable cost and that there is no reason why antitrust law should offer them a safe haven against price competition in that circumstance.

2.2 The effects-based approach, the AEC principle and as the price-cost test

The general idea of the AEC test is that competition law should only protect competitors who are at least no less efficient than the dominant company and that will guarantee an effective competitive process to the benefit of the final consumers. Consequently, the test is consistent with the main objective of the EU competition law - maximising consumer welfare. This may explain why, the AEC test was adopted by the European Commission in its Guidance Paper, where it was considered that a conduct should be considered anti-competitive only if it has hampered or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking - a principle known as the AEC test.[24] Further, the Commission considered that anti-competitive foreclosure could be evaluated through a price-cost test as a specific instrument that would determine whether an as efficient competitor could survive or not. The Commission considered that price-based exclusion should be evaluated through comparing actual costs and prices of a dominant company in order to assess whether the dominant company is sacrificing profits by its conduct. Thus, the presumption is that if a dominant company's pricing is below an appropriate measure of cost, an as efficient competitor

[21] Federico Etro and Ioannis Kokkoris, 'Towards an Economic Approach to Art. 102' in Federico Etro and Ioannis Kokkoris (eds) *Competition Law and the Enforcement of Article 102* (OUP, USA 2010.

[22] Phillip Areeda and Donald Turner, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review 697, 710.

[23] Ibid, 707.

[24] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45/7 (hereinafter the Guidance Paper), para 23.

with the same cost structure would not be able to match its prices and, thus, to compete without incurring a loss. The Commission considered the price-cost test (requiring profit sacrifice as a key element) as a specific instrument to verify whether an as efficient competitor will be foreclosed. Hence, the object of the test suggests that profit sacrifice is a key element in finding a violation of Art. 102. From this perspective, the AEC test is a price-cost test. The EU Courts made clear that in price-cost abuses there is an obligation for a price-cost test to be carried out because '*it is impossible to assess whether a price is abusive without comparing it with other prices and costs*.'[25] Thus, the anti-competitive effect cannot be presumed without conducting an economic analysis and the AEC test has been recognised as a *sine qua non* of the assessment of price-based abuses. In this sense, the AEC test has strong roots in the established EU case law as regard price based exclusionary conduct. As far as the test prescribes as a benchmark the dominant company's own cost structure it suggests that the test could be used as an *ex ante* self-assessment by the dominant company. Thus, the test creates legal certainty and this is one of the reasons why the EU Courts adopted the test in *TeliaSonera*, *Deutsche Telekom* and *Post Danmark I.* **In this sense, the AEC test in terms of price-cost test is the appropriate standard for the evaluation of price based exclusionary conduct.**

As regard the application of the price-cost test in rebate cases, previous research has indicated that 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 in two cases.[26] Firstly, when a dominant company applies incremental rebates and the price for the incremental units is lower than the average incremental cost per unit. This is because the lower price for the additional units is the feature that urges the customers to purchase more units from the discounter, this means that the price is the feature that is driving customer's behaviour. In those cases, a rebate scheme is a pricing conduct and the assessment should be the same as in normal predation. If the price for the additional units is predatory, it will fall under the law of predatory pricing where the price-cost test is applicable. Secondly, a price-cost test may be appropriate if the dominant company is dominant but not necessarily an unavoidable trading partner. In this case, the dominant company and its competitors compete for the whole demand (not only for the non-assured base of sales), which means that competition is based on prices. In those cases, if a dominant company's pricing is predatory, an anti-competitive exclusion of competitors is more likely. From the above, it can be concluded that the application of a price-

[25] Case T-286/09 *Intel v Commission* [2014] ECR II-547 (hereinafter GC judgement), para 152.

[26] Marinova, Fidelity rebates in competition law, chapter III.

cost test is an important tool in the assessment of the legality of rebates when rebates constitute price-based conduct, and the price is the mechanism of exclusion.

Further, the Commission observes that the application of a price-cost test is only a part of the assessment identifying anti-competitive foreclosure, since the low prices do not in themselves harm competition and the result of the test should be combined with the other evidence. The Commission's own definition of anti-competitive foreclosure suggests that, in order to amount to an anti-competitive practice, the conduct must foreclose competitors leading to a harmful effect on competition, which would in turn harm consumers. Thus, 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 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 recognized that some forms of conduct can be exclusionary without involving below-cost pricing.[27] Still, the approach is effects-based because it requires an assessment of the effect of the conduct on the competitive structure that might harm consumers.
Thus, if the concept of the AEC test is that only an exclusion of an as efficient competitor is capable of harming consumers, it still can be an effects-based approach even if the assessment is carried out without a formal price-cost test. In this sense, the concept of an AEC test, not the price-cost test in itself, can be correctly equated with the effects-based approach.

2.3 Implementation of the AEC price-cost test in non-price abuses

As explained above, the AEC price-cost test requires a profit sacrifice to be found in order for a dominant company's practice to have an anti-competitive exclusionary effect. Yet, certain behaviors can result in anti-competitive effects without requiring the dominant company to set prices below costs. In instances like exclusive agreements, the potential for anti-competitive exclusion is significant and can occur even if the dominant company's prices are above the appropriate cost measure. In such a scenario, the dominant company must limit exclusive agreements to a minimum number of buyers, aiming to prevent the entrant from reaching Minimum Efficient Scale (MES) and to cover its fixed costs. In this situation, a competitor can

[27] Case C-53/92 P *Hilti v Commission* [1994] ECR I-667 (hereinafter *Hilti*); Case C-333/94 *P Tetra Pak International SA v Commission* [1996] ECR I-5951, para 41 (hereinafter *Tetra Pak II*).

be excluded or marginalized from the market. In these cases, the conduct would not be deemed abusive under the AEC price-cost test because the rival's costs are higher than those of the dominant company, which enjoys economies of scale.

Numerous economic studies indicate that fidelity rebates could be anti-competitive, even when the discount is above cost.[28] Consequently, even if the price does not fall below cost, the practice may still result in exclusionary effects. In such instances, the AEC price-cost test is incapable of capturing the anti-competitive impact of rebates, rendering the application of the test irrelevant. Arguably, the Commission's Guidance Paper acknowledges this and suggests that evaluating anti-competitive foreclosure in cases of non-price conduct, such as exclusive purchasing, refusal to supply, and tying, should be done without relying on a price-cost test. However, the Guidance Paper lacks clarity on distinguishing between conditional rebates that mimic exclusive purchasing obligations (non-price conduct) and those that might be considered pricing conduct. While some forms of conduct, like tying and refusal to deal, can easily be classified as non-price conduct, the categorization of conditional rebates is less obvious.[29] The uncertainty surrounding whether conditional rebates fall within a pricing or non-pricing category is crucial for determining the appropriate framework for their assessment. If conditional rebates are viewed as pricing conduct, the application of a price-cost test would be pertinent in evaluating their anti-competitive effects. Conversely, if they are considered non-price conduct, an assessment based on qualitative evidence, rather than a comparison of price and cost, would be relevant. Therefore, in the new Article 102 Guidelines, the Commission should clarify the distinction between conditional rebates that resemble exclusive purchasing obligations (non-price conduct) and those that might be seen as pricing conduct, outlining the

[28] Philippe Aghion and Patrick Bolton 'Contracts as a Barrier to Entry' (1987) 77 American Economic Review 388; Eric Rasmussen, Mark Ramseyer and John Wiley, 'Naked Exclusion' (1991) 81 American Economic Review 1137; Ilya Segal and Michael Whinston, 'Naked Exclusion: Comment' (2000) 90 American Economic Review 296; Einer Elhauge, 'How Loyalty Discounts Can Perversely Discourage Discounting' (2009) 5(2) Journal of Competition Law and Economics 189; Einer Elhauge and Abraham Wickelgren, 'Anticompetitive Market Division Through Loyalty Discount without Buyer Commitment' (2012) Harvard discussion paper No 723 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125428 > accessed 2 October 2015; Einer Elhauge and Abraham Wickelgren, 'Robust Exclusion and Market Division through Loyalty Discounts with Buyer Commintment' (2014) Harvard discussion paper No 722; David Spector, 'Exclusive Contracts and Demand Foreclosure (2011) 42(4) The RAND Journal of Economics 619; Timothy Brennan, 'Bundled Rebates as Exclusion Rather than Predation' (2008) 4 Journal of Competition Law and Economics 335; George Bulkley, 'The Role of Loyalty Discounts when Consumers are Uncertain of the Value of Repeat Purchases' (1992) 10 International Journal of Industrial Economics, 91.

[29] Anders Jessen, *Exclusionary Abuse after the Post Denmark I Case: The Role of the Effects-Based Approach under Article 102 TFEU* (Wolters Kluwer 2017) 104.

different assessments depending on whether the price is the mechanism of exclusion (as explained in section 2.2 above).

2.4 Competition from less efficient competitors

In certain industries characterized by high fixed costs, particularly in research and development, and very low variable costs, relying on a price-cost test may not yield substantial evidence of anti-competitive conduct, potentially resulting in over-enforcement.[30] Likewise, within markets exhibiting economies of scale and scope, where the dominant company's average cost decreases with increased output (economies of scale) or the joint production of two or more products (economies of scope), commentators argue that the dominant company's cost structure will inherently differ from that of its competitors due to these economies.[31] In such scenarios, when a new competitor enters the market, at the beginning their costs will be higher than the dominant company's because the rival has not yet reached its Minimum Efficient Scale (MES).[32] During this early stage, the new entrant may operate less efficiently than the incumbent. However, this dynamic could shift if the entrant successfully establishes itself in the market, eventually attaining economies of scale and scope comparable to those of the dominant company.[33]

Nonetheless, if the competitor is currently less efficient, the dominant company may set prices above cost but a competitor would still not be able to match this price because of the economies of scope and scale, which does not necessarily imply that the less efficient entrant cannot impose competitive constraints in the market.[34] On the contrary, even the entry of a less efficient rival can stimulate competition and can decrease prices if an incumbent was charging at monopoly prices before the entry.[35] The dominant company's reaction to the new entry could

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[30] Sean Gates, 'Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts' (2013) 79(1) Antitrust Law Journal 99

[31] Brian Sher, 'Leveraging Non-Contestability: Exclusive Dealing and Rebates under the Commission's Article 82 Guidance' (2009) 2(1) Antitrust Chronicle 1, 9.

[32] Robert O'Donoghue, 'Verbalizing a General Test for Exclusionary Conduct under art. 82 EC' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds) *European Competition Law Annual 2003: What is Abuse of Dominant Position* (Bloomsbury Publishing 2006) 327, 339.

[33] Andrea Renda and John Temple Lang, 'Treatment of Exclusionary Abuses Under Article 82 of the EC Treaty: Comments on the European Commission's Guidance Paper' (2009) Centre for European Policy Studies,31.

[34] Economides, 'Tying, Bundling and Loyalty/Requirement Rebates (n 276) 33; Patrick Rey, 'Abuses of Dominant Position and Monopolization: An Economic Perspective' in Abel Moreira Mateus and Teresa Coelho Moreira (eds) *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* (Edward Elgar 2010) 189, 191.

[35] Ioannis Lianos, 'The Price/Non Price Exclusionary Abuses Dichotomy: a Critical Appraisal' (2009) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398943 > accessed 22 December 2017.

be to reduce its price in order to deter the entry, which means that consumers will benefit from the low prices. In this sense, the entrance of a less efficient competitor can enhance consumer welfare.[36] Hence, the entry of a less efficient competitor may impose a competitive constraint on the dominant company and improve consumer welfare.[37] The same observations may apply to markets where the dominant company has first mover advantages, benefits from a statutory monopoly or are state-owned or privileged enterprises.[38] In those markets, the only competition that dominant firms are likely to face is the competition from less efficient rivals.[39] Indeed, the European Commission in its Guidance Paper described some circumstances in which a less efficient rival can stimulate competition, and explained that this should be taken into account.[40] The CJEU shared a similar approach in *Post Danmark II*.[41]

2.5 The European Commission's modified price-cost test

When the dominant company is an unavoidable trading partner, customers normally buy certain amounts of their requirements from the dominant company, the so-called 'assured' base of sales (or non-contestable part of demand).[42] This results in the establishment of both a non-contestable and contestable part of demand, creating a situation where competitors are unable to vie for the entire demand. Consequently, economists recognized that, in the case of retroactive 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.[43] For that reason a modified price-cost test, which aims to compare the price with the loyalty discount for the whole purchased units attributed only for the contestable sales with the

[36] Salop, 'Avoiding Error in the Antitrust Analysis of Unilateral Refusals to Deal (n 556); Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit- Sacrifice Standard' (n 43) 328-29.
[37] John Temple Land and Robert O'Donoghue, 'Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC' (2002) 26 Fordham International Law Journal 83; Herbert Hovenkamp, 'The Antitrust Standard for Unlawful Exclusionary Conduct' (2008) 9, 14.
[38] John Temple Lang, 'The Requirements for a Commission Notice on the Concept of Abuse under Article 82 EC' CEPS Special Reports (2008) 28.
[39] Marina Lao, 'Defining Exclusionary Conduct under Section 2: The Case for Non-universal Standards' in Barry Hawk (ed) *International Antitrust Law & Policy: Fordham Competition Law* (Ch 19, Juris Publishing 2006) 433, 446.
[40] The Guidance Paper, para 24.
[41] *Post Danmark II* Judgment, paras 59-60.
[42] 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.

[43] Jacobson, 'A Note of loyalty Discounts' (n 292); Klein and Lerner, 'Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts' (n 337) 633.

costs of providing these incremental units, was proposed.[44] This is exactly the test that the European Commission indicated in its Guidance Paper that the AEC test to be applicable to conditional rebates. However, the implementation of this test requires identifying the effective price calculated over the relevant range of sales for the specific period, dependent on the contestable share of demand—i.e., how much of a customer's purchase requirements can realistically be switched to a competitor. Thus, defining the contestable portion of demand is outcome determinative.[45] Determining the contestable portion of demand poses challenges as it varies for each customer and is likely influenced by industry and product characteristics, making practical implementation difficult and leading to unpredictability.[46]

The challenge lies in determining the contestable share of demand. Various perspectives exist on this matter. One viewpoint suggests that the contestable share equals the market share not held by the dominant company. For instance, if the dominant company holds a 70% market share, the contestable part is presumed to be 30%. Alternatively, the contestable share might be linked to the discount level set by the dominant company. If, for instance, the rebate eligibility threshold is 80%, then the contestable part is considered to be 20%.[47] Another argument posits that the contestable share is derived by subtracting the non-contestable units from the rebate eligibility threshold. In this scenario, if the non-contestable share is 60%, and the threshold for obtaining rebates is 80%, the contestable share is calculated as 20%.[48] 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.[49]

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[44] Initially, the modified price-cost test for fidelity rebates was recommended by Phillip Areeda and Herbert Hovenkamp, *Antitrust Law* (3th edn, Little Brown 2008) 341 and later on supported by Klein and Lerner, 'Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts' (n 337) 633. At EU level, it was supported by Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1(1) Journal of Competition Law and Economics 149 and Giulio Federico, 'When are Rebates Exclusionary?' (2005) 26(9) European Competition Law Review 477. **The test was proposed by the US DoJ, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 101 (September, 2008) and withdrawn one year later. According to** US submission for the OECD Report (2008) there is no court that endorse tis modified test.

[45] Derek Moore and Joshua Wright, 'Conditional Discounts and the Law of Exclusive Dealing' (2014) 22 George Mason Law Review 1205, 1242.

[46] In its submission to the OECD 2008 Report, the OFT recognised that the estimation of the contestable part of demand is the most difficult aspect of the test. See also OECD Report (2016) para 64. See also 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.

[47] Moore and Wright (n 44) 1243.

[48] Nicolas Economides, 'Tying, Bundling and Loyalty/Requirement Rebates' in Einer Elhauge (ed) Research Handbook on the Economics of Antitrust Law (Edward Elgar Publishing 2012) 31.

[49] Salop, 'The Raising Rivals' Cost Foreclosure Paradigm' (n 48). Indeed, it is very likely that any analysis conducted by the dominant company would not be based on the same data as that conducted by an authority, given the authority's likely access to information from more sources.

The practical application of this test becomes highly questionable, if not nearly impossible, due to this uncertainty, as evident from recent Commission decisions and judicial reviews of the price-cost test's application. Additionally, the dominant company faces challenges in obtaining information about this contestable share in advance, hindering their ability to estimate the effective price and determine the potential legality of their conduct.[50]

These arguments invite to the conclusion that the modified price-cost test creates legal uncertainty and its practical implementation as regard fidelity rebates is questionable. Moreover, it is ‘unlikely to shed much light on the ultimate question of competitive effect.’[51]Another shortcoming of the modified price-cost AEC test is the uncertainty around an investigation of 'other factors' where the effective price is between AAC and LRAIC. This additional qualification makes the approach even more uncertain and unpredictable.

From this perspective, it seems 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.’[52] For that reason, the European Commission should abandon the modified price-cost test in the new Article 102 Guidelines.

III. Evolution of the case law as regards the application of the AEC test

As indicated in the previous section, the effects-based approach requires an assessment of the effect of the conduct on competition in order to distinguish anti-competitive conduct from legitimate competition. A conduct is considered anti-competitive if a competitor that is at least as efficient as the dominant company is foreclosed, which can be assessed through the evaluation of all the circumstances including a price-cost test depending on the circumstances of the case, as a part of the assessment. The first case in which the Commission followed the provisions of the Guidance Paper and conducted an in-depth assessment to assess the effect of fidelity rebates granted by an undertaking possessing market power under Art. 102 - including

[50] Renda and Lang (n 30) 12. Similar comments was made by Ariel Ezrachi, ‘The European Commission Guidance on Article 82 EC - the way in which institutional realities limit the potential for reform’ (2009) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463854 > accessed 9 October 2015, 13; Gianluka Faella, ‘The Antitrust Assessment of Loyalty Discounts and Rebates’ (2008) 4(2) Journal of Competition Law and Economics 375.
[51] OECD Report (2016).
[52] Geradin, ‘A Proposed Test for Separating Pro-Competitive Loyalty Rebates from Anti-competitive Ones’ 25.

a price-cost test is *Intel*.[53] The Commission emphasised that this assessment was not necessary, and it was conducted merely for completeness. Despite this clarification, the Commission's decision to employ this test opened the Pandora's box and initiated a series of legal challenges, unleashing two decades of litigation, as elaborated upon below.

On appeal, the GC upheld the Commission's decision and concluded that the Commission was not required to prove a causal link between the practices in consideration and the actual effects on the market and that the price-cost test was not required for finding an infringement of Art. 102. The GC distinguished between pricing and non-pricing abusive practices and stated that the AEC test may be a necessary part of the assessment of price-based abuses, because '*it is impossible to assess whether a price is abusive without comparing it to other prices and costs'*,[54] whereas in the case of exclusivity rebates, it is the condition of exclusive or quasi-exclusive supply that makes access to the market more difficult and, as such, abusive rather than the amount of the rebate.[55] The GC reached the same conclusion in the recent *Google Shopping* judgement holding that the AEC test is warranted only in the case of pricing practices (e.g., predatory pricing or margin squeeze) and was thus irrelevant here.[56] Next, the GC clarified that the test is inadequate in capturing the anti-competitive nature of rebates, and foreclosure effects could still arise even if an equally efficient competitor could theoretically enter the market. This stance implies that the GC viewed the test as susceptible to false negatives, suggesting that passing the test by the dominant company does not negate the possibility of foreclosure effects.[57] 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. As outlined in the previous section, the relevant economic theories support the conclusion that under these circumstances, fidelity rebates can be anti-competitive even if prices are above the appropriate measure of cost.[58] Next, the GC held that the price-

[53] Commission Decision.
[54] Ibid, para 152.
[55] Ibid, para 152.
[56] Case T-612/17 - *Google and Alphabet v Commission* (Google Shopping), para 583.
[57] The GC 2014 judgment, para 150.
[58] John Simpson and Abraham Wickelgren, 'The Use of Exclusive Contracts to Deter Entry' (2001); John Simpson and Abraham Wickelgren, 'Naked Exclusion, Efficient Breach, and Downstream Competition' (2007) 97 American Economic Review 1305; Jose Miguel Abito and Julian Wright, 'Exclusive Dealing with Imperfect

cost test is also not required for the evaluation of the 'other' types of rebates because the assessment of all the circumstances was considered enough to demonstrate the existence of a loyalty mechanism, which was deemed to amount to an anti-competitive effect that did not have to be demonstrated by means of a price-cost test. This position was adopted in AG Kokott's opinion[59] and repeated in the *Post Danmark II* judgement where the CJEU considered the AEC test neither legally required nor decisive for establishing an abuse, which might be seen as limiting its usefulness in general.[60] 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.[61] Secondly, the CJEU held that the application of the AEC test does not constitute a necessary condition for a finding of abuse, indicating that there is no legal obligation to employ that test. Finally, the GC's rejection of the price-cost test in its 2014 judgment aligns with the stance of numerous academics who contend that the test is susceptible to significant implementation errors.[62]

Further, in the *Intel* case, the GC considered the relevance of the coverage of the practices in consideration and concluded that in markets where the 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.[63] Accordingly, in the *Post Danmark II* case, 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.[64] Arguably, the EU

Downstream Competition' (2008) 26(1) International Journal of Inductrial Organisation 227; Patrick DeGraba, 'Naked Exclusion by a Dominant Input Supplier: Exclusive Contracting and Loyalty Discounts' (2013) 31 International Journal of Industrial Organization 516.

[59] Case C-23/14 *Post Danmark A/S v Konkurrenceradet*, Opinion of AG Kokott, para 56.

[60] James Venit, 'Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning' (2016) 7(3) Journal of European Competition Law & Practice 165.

[61] 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 (n 22) 67.

[62] Steven Salop, 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-cost Test' (2017) Antitrust Law Journal 371. For full analysis and criticism of the difficult practical implementation of the price-cost test see Marinova, Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test (Wolters Kluwer 2018) chapter VII.

[63] Ibid, para 116.

[64] *Post Danmark II*, paras 70-73. The position of the CJEU in *Intel* 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

Courts have refused to evaluate the coverage of fidelity rebates so far. However, the GC position seems reasonable and is in line with the economic theories of exclusion and explanation that in some markets characterised by high fixed costs and constant demand mean that 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 demand, which might nonetheless be large enough to prevent the rivals achieving MES.[65]

Finally, the GC considered that the duration of the supply contracts is not relevant but the possibility of termination/switching to an alternative source of supply without incurring costs is. The 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.[66] 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.[67] However, 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.[68] Other empirical models 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

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possibility of a de minimis threshold under Article 102' as rightly observed by James Venit, 'The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?' (2017) 13(2) 3 European Competition Journal 172, 186.

[65] 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 marginalise competitors of a dominant company by preventing them from reaching MES. According to this economic theory, the degree of foreclosure does not make economic senses, see in particular Meese and that intervention might be appropriate irrespective of the percentage of the foreclosed market, see Jonathan Jacobson, 'Exclusive dealing, Foreclosure, and Consumer Harm' (2002) 70(2) Antitrust Law Journal 311.

[66] Ibid, para 113.

[67] *Case 322/81 Michelin v Commission [1983] ECR I-346,* para 81; *Case T-203/01 Michelin v Commission [2003] ECR II-407,* para 88.

[68] Frank Maier-Rigaud, 'Switching Costs in Retroactive Rebates-What's Time Got to Do with it?' (2005) 26(5) European Competition Law Review, 272; Gianluka Faella, 'The Antitrust Assessment of Loyalty Discounts and Rebates' (2008) 4(2) Journal of Competition Law and Economics 375, 405; See also Jacobson, 'Exclusive Dealing, Foreclosure, and Consumer Harm' (n 57) 352. According 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.'

customer has to incur in order to terminate a contract.[69] 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 short notice without penalties, such as a termination of the contract or requirement to return the rebates would suggest that the practice is capable of harming competition.[70] From this perspective, the GC'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.[71] From this perspective, an evaluation of the reference period in itself seems redundant. The judgment of the GC seems in line with the economic theory of exclusion and provides important clarification on that point too.

Chronologically, the next judgment in which the application of the price-cost AEC was raised as a central issue was *Post Danmark II*, where the test was rejected by the CJEU.[72] The CJEU thus confirmed the GC's position in *Intel* that the price-cost test is not necessary for rebates that fall into the third category, for which an examination of 'all the circumstances' of the case is necessary. The CJEU rejected the implementation of the AEC price-cost test as irrelevant in practice for this particular case because the market structure in Denmark was unlikely to accommodate the existence of an as efficient competitor.[73] In addition to this statement, the CJEU in *Post Danmark II* suggested that the price-cost test could be used as one tool amongst others, which means that the application of the test is not rejected in general.[74] At the same time, the CJEU left the question open as to which circumstances the test could be usefully applied, or how it should be applied. If the AEC test is one of the factors in the assessment of abusive rebates, how can the added value of the test be weighed against the other relevant circumstances? Furthermore, does the cost of administering in practice such a test justify the cost of its implementation? These questions are 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*

[69] Philippe Aghion and Patrick Bolton 'Contracts as a Barrier to Entry' (1987) 77 American Economic Review 388, 389.
[70] Jonathan Jacobson, 'Exclusive dealing, Foreclosure, and Consumer Harm' (2002) 70(2) Antitrust Law Journal 311.
[71] GC 2014 judgment, para 113.
[72] Case C-23/14 *Post Danmark A/S v Konkurrenceradet* (Post Danmark II).
[73] Ibid, para 60.
[74] Ibid.

disproportionate use of the resources of the competition authorities and the courts.'[75] This statement puts into question whether the price-cost test is appropriate given its cost of administering in practice and whether it justifies the resources for its implementation, considering the fact that the test is not a requirement by law.[76]

Nevertheless, the highly anticipated 2017 CJEU judgment in *Intel* added more complexity than clarity to the case. The Court specified that the Commission is obligated to examine all circumstances, 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 competitors at least as efficient as the dominant undertaking from the market.[77]

However, the CJEU considered that, in cases when the Commission carries out an in-depth analysis of all the circumstances, including a price-cost AEC test (regardless of the fact that the Commission was not required by law to do so and it did it for completeness) and the defendant is able to present evidence to put into question the validity of the Commission's findings, the GC must examine all of these arguments.[78] The CJEU clarified that the correctness of the implementation of the test should be assessed because it is in the decision and the defendant challenged the Commission's analysis by providing evidence that put into question the correctness of this analysis. In other words, the case was sent back to the GC on procedural grounds because the judgment failed to take into account Intel's arguments in the name of the right of defence. However, what the CJEU did not consider is whether the results of the test even if applied correctly (which is questionable as explained in the previous section) can be a supportive or decisive factor in finding an infringement of Art. 102.

The latest judgement of the GC in the *Intel* case continued the Intel saga without attempting to clarify the law. It annulled the Commission's decision from 2009 which according to the Court was justified only by one single error resulting from the failure to take into consideration, in the initial judgment, Intel's arguments that challenge the Commission's AEC analysis, which was applied to test the legality of the loyalty rebates. The GC concluded that the Commission made an error in its application of the AEC price-cost test, affecting in particular the calculation

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[75] Case C-23/14 *Post Danmark A/S v Konkurrenceradet*, Opinion of AG Kokott, para 66 (hereinafter Opinion of AG Kokott).

[76] In Intel decision, the Commission applies the AEC test on 150 pages. The decision of the Commission to implement the test led to almost 20 years litigation with the correctness of the AEC test as a main issue.

[77] CJEU judgment, para 139.

[78] Ibid, paras 141-42.

of the contestable shares (i.e. the proportion of a customer's demand that could be captured by an as-efficient-competitor) and the value of the conditional rebates. However, it nevertheless reaffirmed the application of an 'effects-based' approach which requires careful economic analysis in order to establish the abusive nature of fidelity rebates.[79] The judgement demonstrates that the presumption that fidelity rebates are restriction of competition 'by object' can be rebutted by the dominant company.[80] It also clarifies that the price-cost 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. This statement adds complexity to the case, as the Court continues to address a test conducted by the Commission for completeness, which is not an essential part of the assessment and doesn't contribute value to the overall evaluation, instead of questioning the Commission's decision to conduct the test initially, the Court is instead engaged with its intricacies.

In contrast to its previous judgment, the General Court's 2022 Intel ruling did not differentiate between pricing and non-pricing abusive practices. It failed to clarify that the AEC price-cost test might be essential for evaluating price-based abuses but not applicable to exclusivity rebates. Additionally, the court did not thoroughly assess the coverage and duration of rebates, and it refrained from addressing whether the Commission should have employed a price-cost test in this specific case - a test that is innovative, highly intricate, susceptible to implementation errors, and, to date, has not received endorsement from any court as appropriate. In essence, the General Court did not engage with the substance of the case but instead adhered to the framework established by the CJEU and scrutinized the correctness of the Commission's conducted price-cost test. Indeed, the Commission appealed the GC judgment challenging the approach taken by the Court. In essence, the Commission alleges that Court failed to make an overall assessment of the capability of Intel's practices to foreclose competition in the light of all the relevant circumstances and misinterpreted the AEC test as applied in the contested decision.[81] The recent opinion of AG Madina, argues that the Commission's objections to the GC's evaluation of the AEC test, lack merit and advises the

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[79] Case T-286/09 *REVN Intel v Commission* ECLI:EU:T:2022:19

[80] Miroslava Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' 2022, European Papers-A Journal on Law and Integration, no. 2 (2022): 627-639.

[81] The Commission appeal the GC judgment and submits six grounds in support of its appeal: CURIA - Case information (europa.eu)

CJEU to dismiss the appeal. If the CJEU decides to follow AG Medina's opinion, the Commission has to do the final step of the Intel saga.

More, recently, in the *Google Android* case, the GC 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 can be useful, without clarifying whether this test is always necessary. [82] However, the Court was clear that where the Commission applies the AEC test, it must do so 'rigorously.'[83] In addition, the Court expressed '*doubts as to the correctness and validity of the AEC test carried out by the Commission*.'[84] As a result, the Court found this analysis to be erroneous, largely for procedural reasons and annulled the Commission's decision but nevertheless considered portfolio-based revenue sharing agreements as a separate abuse.[85] For similar reasons, the Commission's decision in *Qualcomm* was annulled by the GC.

After examining the case law above, which highlighted the unsettled nature of the role and application of the price-cost AEC test, the preliminary reference to the CJEU in the *Unilever* case introduces further questions. The following section of the paper will scrutinize the case's facts and legal context to elucidate the stance of the Italian Court. This analysis aims to extract some insights that can guide the European Commission in formulating the new Article 102 Guidelines.

IV. The *Unilever Italia* case

4.1 The Italian Competition Authority decision

In October 2017, the Italian Competition Authority (ICA) imposed a €60 million fine on the multinational consumer goods company Unilever for allegedly abusing its dominant position in the Italian market for individually packaged ice cream sold for consumption away from home, contrary to Article 102 TFEU. The investigation was initiated in 2013 following a complaint from a competitor, La Bomba Company, who claimed that Unilever implemented, through its dealers, exclusivity agreements with the independent bars and trade associations, according to which they are not allowed to sell competitor's products. This instruction was accompanied by the threat of withholding agreed-upon discounts, imposing penalties, and terminating supply contracts. The complainant claimed that Unilever's exclusive supply

[82] Case T-604/18 *Google and Alphabet v. Commission* (Google Android), Paras 640 -1.
[83] Ibid, para 644.
[84] Ibid, para 752.
[85] Ibid, para 802.

contracts and behaviour prevented La Bomba's business development and investments, despite consumer demand for its quality product. The ICA found that the purportedly abusive conduct was not directly carried out by Unilever itself, but rather by independent third-party distributors within Unilever's Italian ice cream distribution network. These distributors had imposed exclusivity clauses and incentives in their supply agreements that contractually obligated retailers, such as cafes and beach resorts, to source their away-from-home ice cream products solely from Unilever.

During its investigation, the ICA took the view that the independent distributors' actions in securing the exclusivity agreements could be fully imputed to Unilever as the manufacturer. The ICA found that Unilever's distributors provided cabinet freezers on loan to the customers with the requirement that the branded Unilever's cabinets be used exclusively for the Unilever products. The evidence gattered by the ICA showed that Unilever had a clear strategy to monitor and control the exclusivity clause. For example, the ICA found a letter from the dealers to the retailers warning them against storing non-Algida branded products in the refrigerators, as it went against company policy. It also threatened to withdraw the end-of-year discount if such violations were detected by their staff.[86] In addition to that, Unilever applied to over 90% of its customers a personalized combination of other discounts, rebated and contractual clauses. For example, Unilever applied the so-called "end of year" discount, in fixed amount or percentage of the turnover, and therefore proportionate to the volume of purchases, which was provided with a credit note during the supply period, therefore it could be paid even after the period of validity of the contract, therefore assuming a retroactive nature.[87] In particular, the end-of-year discounts applied by Unilever were paid, as a matter of practice, between the months of January and April of the year following the reference year which effectively coincides with the moment of negotiation of the new contractual relationship. In practical terms, this would ensure the ongoing existence of the exclusivity agreement, as customers would possess a significant financial incentive to refrain from switching to an alternative supplier. Furthermore, as confirmed by Unilever, the liquidation of the year-end discount was never paid in cash, but rather by credit note. In addition, the ICA found that Unilever customers were not certain of being able to take advantage of the end-of-life discount in the event of interruption of supplies and/or violation of exclusivity. In particular, customers who violate the

[86] Section 2.5.4 from the ICA decision. The translation is based on Google translate; therefore all errors and omissions are my responsibility.
[87] Ibid, para 204.

exclusivity obligation or who turn to another supplier when renewing the contract were threatened to be penalised by non-liquidation of the year-end discount. Thus, the cost of breaching the agreement was high, which amounted to a penalty in the form of losing the discount. In addition to that, Unilever applied target discounts and compensations conditioned on specific sales goals and assortment discounts and compensations linked to the continuous maintenance of a basket of products.[88] In addition, Unilever provided promotional compensations if retailers gave privileged exposure to the their products through the correct positioning of the equipment and display of Unilever products in particularly visible positions. This discount was not related to any performance of the operator, being simply a percentage of the annual turnover. For that reason, the ICA considered that the compensation that has no value cost represents a financial advantage granted to the customer.

The ICA evaluated the duration of the agreements and found that duration of the contracts was between 1 and 5 years (approximately 60% of customers have contracts with a duration of more than two years) with a tacit renewal clause according to which in the absence of cancellation the contract was considered renewed. Based on that, the ICA considered that the existence of exclusivity obligations, penalties for switching supplier, long duration of the contracts and significant coverage of the practices was sufficient to establish an abuse of dominance by Unilever, without needing to demonstrate actual anti-competitive effects. This assessment reflects the CJEU's position in *Intel*.

During the investigation, Unilever submitted two economic analyses; the first one was entitled "Is Unilever able to exclude its competitors from the Out-Of-Home ice cream segment?", with which it had carried out an analysis of the exclusionary scope of the clauses and Unilever's discounting practices[89] and was based on "*efficient breach of contract*" analysis which sought to attribute a value to each contract and hence check whether the competitors could match that value.[90] The second one was '*direct exercise of the AEC test*' applied in the *Intel* case by the EU Commission and it was filed after the ICA rejected the first one as irrelevant. This test presupposes that a certain share of the sales of the operator in a dominant position must concern

[88] Ibid, para 210.
[89] Ibid, para 257.
[90] Katarzyna Czapracka, Assimakis Komninos, Niccolò Piga, EU Court of Justice Confirms That the Intel Effects-Based Approach Applies to Exclusive Dealing and Clarifies the Narrow Circumstances Under Which The Conduct of Distributors Can Engage The Liability of a Dominant Company (White & Case)/January 27, 2023 <https://competitionlawblog.kluwercompetitionlaw.com/2023/01/27/eu-court-of-justice-confirms-that-the-intel-effects-based-approach-applies-to-exclusive-dealing-and-clarifies-the-narrow-circumstances-under-which-the-conduct-of-distributors-can-engage-the-liability/ > accessed 17 October 2023.

must-have products, a circumstance which Unilever considers unrealistic and not supported by the evidence. Therefore, it was necessary to assess whether, in light of a certain level of non-contestable demand covered by the must-have products of the dominant operator, a competitor 'as efficient as the one in a dominant position' would be able to offer a sufficiently high discount to induce customers to purchase from it the 'contestable' share of their demand. The result of the test is that the share of Unilever's turnover which would not pass the test (in other words the share of demand currently covered by Unilever which cannot be contested by an equally efficient competitor given Unilever's current commercial policies) would in any case be irrelevant.[91]

For that reason the ICA considered that there is no obligation to consider the AEC test submitted by Unilever as the application of the test is not necessary to demonstrate the exclusionary effect and declined to substantively analyse the AEC test.[92] The Administrative Court of Latium (TAR), in support of the ICA analysis, considered that the principles resulting from the judgment in *Intel* are applicable only in the case of exclusivity rebates and not in the case of exclusivity obligations combined with various rebates as in the case at issue. Unilever claimed the analysis demonstrated rivals with similarly efficient cost structures could still profitably compete despite its exclusivity incentives.

Unilever's initial appeal against the ICA decision was rejected by a national court. However, on a further appeal, the Italian Council of State decided to stay the proceedings and to refer to the CJEU for a preliminary ruling seeking clarification on the interpretation of Article 102 TFEU regarding two main questions. Firstly, under what circumstances can independent distributors' conduct be attributed to a dominant producer like Unilever for the purpose of establishing liability under Article 102? Secondly, in assessing allegedly abusive exclusivity arrangements, is the competition authority required to: a) verify whether such exclusivity clauses have the effect of excluding equally efficient competitors from the market, and to examine supporting economic evidence provided by the company concerning the 'actual' ability of the alleged conduct to exclude from the market competitors that are as efficient as the dominant undertaking and b) to base its allegation of a competition offence on the equally efficient competitor criterion in the case of exclusionary exclusivity clauses or conduct characterised by a large number of abusive practices (loyalty-inducing rebates and exclusivity

[91] Ibid, para 259.
[92] ICA decision, para 257. Note that Google translate was used for the translation of this paragraph. All , errors or omissions are mine alone.

clauses)?' While the CJEU provided significant guidance regarding the first referred question on the imputability of distributors' conduct to a dominant producer under Article 102 TFEU, the scope of this analysis will be confined to examining the CJEU's preliminary ruling on the second question.[93]

4.2 The Opinion of Advocate General Rantos

In his opinion, the AG Rantos began with clarification that the Court's settled case law illustrates that it is not imperative, for the purpose of establishing the abusive conduct of a dominant undertaking, to prove that the conduct resulted in actual anti-competitive effect. Rather, it suffices to establish the potential capacity of generating anti-competitive effect.[94] At the same time, the AG considered the Court's position that the assessment of the capacity to restrict competition must be carried out in the light of all the relevant factual circumstances including the evidence put forward by the dominant undertaking that seeks to demonstrate that the conduct at issue did not actually produce anti-competitive effects.[95] More importantly, the AG Rantos emphasised that from a procedural perspective, in order to respect the rights of the defence, and in particular the right to be heard, the admissibility of evidence of that type is indisputable.[96] Regarding the question as to whether the principle established in the *Intel* judgment,[97] according to which, a competition authority is required to analyse the capability of the conditional rebates to foreclose a competitor as efficient as Intel is also applicable in cases of exclusivity clauses, the AG held that this principle '*applies generally, and independently of the type of restriction*.'[98] The AG observed that in the *Intel* judgment, the Court drew no distinction between exclusivity obligations and rebates subject to an exclusivity obligation, as regards their ability to harm competition.[99] Specifically, the AG referred to paragraph 139 from the *Intel* judgment according to which: '*the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are*

[93] The first questioned is discussed by Christian Kersting, 'Case Note on ECJ, Judgment of 19 January 2023, Unilever (C-680/20), ECLI: EU: C: 2023: 33." *Judgment of* 19 (2023): 250-251.
[94] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato,* para 61.
[95] Ibid, para 62.
[96] Ibid, para 63.
[97] Case C-413/14 P *Intel v Commission* [2017] ECR I-632.
[98] Ibid, para 71.
[99] Ibid, para 73.

at least as efficient as the dominant undertaking from the market' and concluded that this applies to exclusivity obligations and to rebates subject to an exclusivity obligation.[100] Similar to the CJEU judgment in *Intel,* the AG did not make a clear distinction between the AEC test as a general principle and the AEC test as a price-cost test. The AG did not adequately address the fact that the AEC principle is meant to apply broadly to various types of restrictions, unlike the more specific considerations associated with the price-cost test. As regards the second part of the question, as to whether, when analysing the effects of the exclusivity clauses, a competition authority is required to examine in detail the economic analyses produced by the dominant party concerning the actual capacity of the conduct at issue to foreclose competitors that are as efficient as the dominant party from the market, the AG reiterated that '*in order to respect the rights of the defence, and in particular the right to be heard, the admissibility of evidence of that type, from the procedural perspective, is indisputable*.'[101] Moreover, the AG considered that even if the methods used for the purposes of the economic analysis are not relevant, the Commission cannot exclude outright the relevance of such an analysis, unless it sets out the reasons why it considers that the methodology cannot contribute to showing that the behaviour is not capable to foreclose competitors as efficient as the dominant undertaking from the market.[102] From the above, the AG suggested that in order to establish the existence of an abuse of a dominant position, a competition authority is required to demonstrate, in the light of all of the relevant circumstances that that undertaking's conduct was capable of restricting competition, by also analysing, where appropriate and in that regard, the evidence produced by that undertaking and showing that the conduct in question did not produce anti-competitive effects on the relevant market. In addition, the AG stated that the competition authority is under an obligation to state the reasons if it considers that such evidence was not capable of demonstrating that competitors as efficient as the dominant undertaking were excluded from that market.[103]

4.3 The judgment of the Court of Justice

In its reasoning, the CJEU starts with reiterating that the purpose of Art. 102 is to ensure that effective competition is not distorted, clarifying that a dominant company is not prevented from competing on the merits, and that not every exclusionary effect is necessarily detrimental to

[100] Ibid, para 75.
[101] Ibid, para 81.
[102] Ibid, para 85.
[103] Ibid, para 87.

competition, since competition on the merits may, by definition, lead to departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[104] Thus, only if a competitor at least as efficient as the dominant company in terms of, among other things, price, choice, quality or innovation is excluded, the conduct should be considered abusive; a principle already established in the case law.[105] Next, the CJEU reiterated settled case law on the concept of dominance and the special responsibility.[106]

The CJEU also reiterated that the abusive nature of conduct should be demonstrated in the light of all the relevant factual circumstances surrounding the conduct in question including by the evidence adduced in defence by the undertaking in a dominant position.[107] The CJEU also clarified that, in order to establish that conduct is abusive, a competition authority does not necessarily have to demonstrate that the conduct actually produced anti-competitive effects as the ability to restrict competition on the merits, despite its lack of effect, would be sufficient for the establishment of abuse of dominance.[108] The CJEU also clarified that the assessment cannot be based only on economic sciences, confirmed by empirical or behavioural studies, but all other factors specific to the case, such as, the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand an inevitable partner, must be taken into consideration.[109]

The CJEU also referred to the settled case according to which if a dominant company ties its purchasers to obtain all or a contestable part of their requirements exclusively from that undertaking, even not accompanied by rebates, this will constitute by its very nature an abuse of dominant position within the meaning of Art. 102 TFEU. The same principle applies to loyalty rebated granted by a dominant company.[110] The CJEU also reiterated the principle

[104] Para 37. The CJEU refer to the judgment of 12 May 2022, Servizio Elettrico Nazionale and Others, C-377/20, EU:C:2022:379, paragraph 73 and the case-law cited.
[105] Para 39. The CJEU refer to the judgment of 12 May 2022, Servizio Elettrico Nazionale and Others, C-377/20, EU:C:2022:379, paragraphs 69, 71, 75 and 76 and the case-law cited).
[106] Ibid, para 38. The CJEU refer to the judgments of 9 November 1983, Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 57, and of 6 September 2017, Intel v Commission, C-413/14 P, EU:C:2017:632, paragraph 135.
[107] Ibid, para 40. The CJEU refer to the judgments of 19 April 2012, Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 18, and of 12 May 2022, Servizio Elettrico Nazionale and Others, C-377/20, EU:C:2022:379, paragraph 72.
[108] Ibid, para 41.
[109] Ibid, para 44.
[110] Ibid, para 46. The CJEU refer to the jjudgment of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 89).

established in the *Intel* judgment according to which, it is required to analyse all the circumstances including the extent of the undertaking's dominant position on the relevant market, the coverage and the duration of the practice, the conditions and arrangements for granting the rebates and a possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[111]

The Court further clarified that, in cases when an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims, that its conduct was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects, the Competition Authority is required to consider those evidence/economic studies. Moreover, the Competition Authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of anti-competitive effects.[112] As for the AEC test, the CJEU explains this is a concept that refers to various tests that can assess the ability of a company's behaviour to exclude a hypothetical competitor that is equally efficient. This statement refers to the general principle of the AEC test as outlined above. However, the CJEU adds that this includes assessing whether such a competitor could viably match the pricing or incentives offered by the dominant firm. This part of the statement refer to the AEC test as a price cost test. However, the CJEU notes that applying this test may be unsuitable in non-pricing practices or where significant market barriers exist, as it primarily focuses on price competition.[113]

This statement confirms the position of the GC in the initial *Intel* judgment and more recently in the *Google Shopping* judgment that distinguishes between price and non-price competition and confirms that the AEC price-cost test is not appropriate in cases on non-price abuses or in cases in which the price is not the mechanism of exclusion. This important clarification stands as a crucial insight that should be integrated into the upcoming revision of Article 102 Guidelines by the European Commission.

Moreover, the CJEU was clear that when a dominant company is using methods other than those governing competition on the merits, it may be enough to establish the existence of abuse

[111] Ibid, para 48.
[112] Ibid, paras 53-55.
[113] Ibid, paras 56-7.

in some cases.[114] The CJEU reiterated that the competition authorities are not under a legal obligation to conduct an AEC test - a principle already established in *Post Danmark II*.[115] Further, the CJEU clarifies that the application of the AEC test in case of non-pricing practices, such as in the case of exclusivity clauses, can be relevant only where the consequences of the practice in question can be quantified and refers specifically to a situation of exclusivity clauses.[116] In those situations, the CJEU considers, that the test can help to assess if a competing company with similar costs could still make a profit if it had to compensate distributors for changing suppliers or for losing previously agreed discount.[117] For that reason, even if the use of an AEC is an option, if the results of such a test are submitted by the dominant company, the competition authority is required to assess the probative value of those results.[118] This statement makes the application/consideration of the AEC price-cost test an inevitable element in all abuse of dominance cases given that dominant companies will presumably always present economic evidence asserting that the examined conduct is not anti-competitive.

4.4 The Italian Supreme Administrative Court interpretation of the CJEU judgment

On 11 July 2023, following the CJEU's preliminary ruling, the Italian Supreme Administrative Court (the 'Court') affirmed the fine imposed by the ICA and determined that the authority conducted the assessment appropriately in its final judgment. [119] The Court reasoned that the AEC test would only be useful if the alleged exclusionary conduct solely involved rebates, which is in striking contrast to what the CJEU considered. However, the Court found the AEC test inconclusive in this case since the purported exclusion resulted from various practices, some of which were not directly quantifiable. Additionally, the Court considered Unilever's proposed AEC test flawed, as it would allegedly require finding a non-contestable share of the market where Unilever had ‘must-have’ products. The Court stated no such non-contestable share existed since competing products could fully substitute Unilever’s. Moreover, the Court found the AEC test had no evidentiary value given competitors were already present in the market. This statement shows lack of understanding of the substance of the AEC test. However,

[114] Ibid, para 57.
[115] Ibid, para 58. The CJEU refer to Case C-23/14, *Post Danmark A/S v Konkurrenceradet* [2015], para 57.
[116] Ibid, para 59.
[117] Ibid.
[118] Ibid, para 62.
[119] The Consiglio di Stato, sez. VII, 11/07/2023, n. 6806. This section is based on The July 2023 edition of the newsletter VBB on Competition Law also includes a summary of the key aspects of the Council of State's preliminary ruling referring questions on the AEC test to the CJEU: https://www.vbb.com/media/Newsletters/VBB_on_Competition_Law_Volume_2023_Nos._7__8.pdf

this was sufficient for the Court to conclude that the ICA was entitled to disregard the AEC test and upheld the abuse of dominance decision against Unilever. The Court's rejection of the AEC test without assessment of the probative value of those results seems to be in striking contrast to the preliminary ruling delivered by the CJEU. Moreover, it shows the ongoing challenges faced by courts and competition authorities in recognising the proper role of the AEC price-cost test which highlights the need for further clarification and guidance.

V. Conclusion and the way forward for the Commission

The analysis in this paper showed lack of clarity on the conditions and circumstances under which competition authorities are required to apply a specific structured AEC test as part of their analysis. The *Unilever* judgment brought more complexity as the CJEU considered that even if the use of an AEC price-cost test is an option, if the results of such a test are submitted by the dominant company, the competition authority is required to assess the probative value of those results, which makes the application of the AEC price-cost test indispensable in all cases of exclusionary abuses. However, adopting this innovative price-cost test is intricate, susceptible to implementation errors, and entails high administrative costs. The complexity and practical challenges involved raise questions about the justification for dedicating resources to its implementation, potentially introducing more legal uncertainty and the associated risk of errors and their consequential costs.

From the above, it is clear that all stakeholders would benefit if the 2025 Guidelines clearly set out the circumstances in which the European Commission would apply the AEC price-cost test. The Commission should clearly distinguish between price and non-price abuses and clarify that the price-cost test is only relevant if the price is the mechanism of exclusion or the consequences of the practice in question can be quantified, which is line with the case law discussed above. The Guidelines on Art. 102 should provide a clear differentiation between conditional rebates that have effects similar to 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, ***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 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.

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 efficient competitor does not require a price-cost test. In those cases, the treatment of fidelity rebates is clearly effects-based without necessarily conducting a price-cost test. Next, the Commission should distinguish between the predation price-cost test applicable for price-based abuses and the modified price-cost test applicable for conditional rebates and to abandon the former as it does not meet the criteria for administrability and legal certainty – it is extremely complex, prone to implementation errors and there is no court that endorsed this test so far. Finally, should the CJEU follow the advice of AG Medina in the latest *Intel* judgment, it would be prudent for the Commission to bring closure to the Pandora's box that was initially opened by its decision to apply the modified price-cost test in 2009.[120]

[120] *Intel* (Case COMP/37.990) Commission Decision [2009] OJ C227/13