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Competition law in limbo: Intel, fidelity rebates, and the price of procedural errors

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ABSTRACT

The latest judgment of the Court of Justice of the European Union in the Intel case confirmed the General Court's decision that annulled the EU Commission's decision from 2009, imposing a €1.06 billion fine on *Intel* for abusing its dominant position by offering fidelity rebate schemes. The article critically evaluates the judgment and discusses the extent to which the CJEU judgment can influence the substantive assessment of fidelity rebates under Art. 102 TFEU. The article concludes that the Intel case is an example of a procedural error that led to the annulment of a decision, and a missed opportunity to bring clarity to the most complex area in competition law – a price too high to bear in terms of administrative cost and effective enforcement. The paper provides some recommendations on how the Commission could integrate the judgment to streamline Article 102 enforcement in the new Art. 102 Guidelines.

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KEYWORDS Article 102 TFEU; abuse of dominant position; as efficient competitor test; fidelity rebates; Intel

I. Introduction

The *Intel* judgment represents a critical moment in the ongoing interpretation and application of Article 102 TFEU.[1] The judgment confirms several general principles established under Article 102 TFEU. Firstly, the Court reaffirmed the presumption of illegality for fidelity

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*Some parts of this article are based on the author's previously published research; see, in general, M Marinova, Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test (Wolters Kluwer 2018); M Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' (2022) 7(2) European Papers – A Journal on Law and Integration 627.

[1]Case C-240/22 P *Intel Corporation Inc* v Commission (hereinafter *Intel II*) ECLI:EU:C:2024:915.

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rebates established in the earlier case law, particularly in *Hoffmann-La Roche*,[2] while also confirming, as in *Intel I*, that this presumption is rebuttable if the dominant undertaking, during the administrative phase, submits evidence showing that its conduct was not capable of restricting competition or causing the alleged foreclosure effects.[3] In such instances, the Commission must conduct a detailed analysis of factors, including the extent of the undertaking's dominance, the market share impacted, the conditions and arrangements for granting the rebates, their duration and amount, and whether the conduct was part of a strategy to exclude competitors as efficient as the dominant undertaking.[4]

Despite this clarification, the judgment leaves unanswered a critical question: what specific evidentiary threshold must a dominant undertaking meet to trigger the Commission's additional obligation to conduct this analysis? In other words, what kind of supporting evidence is sufficient to challenge the presumption of illegality? This question is particularly significant, as defendants in dominance cases routinely raise such defences, making it crucial to clarify the type and standard of evidence required. The Court merely requires the submission of evidence to be during the administrative process but does not define the material standards or qualitative requirements for such evidence. This ambiguity leaves room for uncertainty in how the presumption of illegality should be rebutted in practice.

Next, the judgment not only leaves numerous questions unanswered but contains several flaws and inconsistencies, creating confusion and misalignment with the jurisprudence under Article 102 TFEU following the *Intel I* judgment. The judgment raises several issues regarding the interpretation of the AEC test, the classification of fidelity rebates as pricing abuse, and its endorsement of the AEC price-cost test as a general principle for evaluating such rebates. This approach conflicts with another line of case law, which does not treat the AEC price-cost test as a definitive or universally applicable standard for assessing anticompetitive conduct.[5] Additionally, this line of case law states that competition authorities are not legally required to conduct an AEC test.[6] The

[2]Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* (hereinafter *Hoffmann-La Roche*), EU:C:1979:36.
[3]Case C-413/14 *Intel v Commission* (hereinafter *Intel I*) ECLI:EU:C:2017:632ECLI:EU:C:2017:632.
[4]*Intel II*, para 331, referring to *Intel I,* para 139.
[5]Case C-48/22 *P Google and Alphabet v Commission* (hereinafter *Google Shopping*) ECLI:EU:C:2024:726; Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* (hereinafter *Unilever Italia*), EU:C:2023:33.
[6]Case C-23/14 *Post Danmark A/S v Konkurrencerådet* EU:C:2015:651 (hereinafter *Post Danmark II*), para 57, also confirmed in *Unilever Italia*, para. 58.

most contentious part is the Court's characterization of the AEC test as a hypothetical exercise detached from the actual exclusion or marginalization of a competitor, which put into question its relevance with the evaluation of all the circumstances as listed in paragraph 139 of the *Intel I*.

Building on this critique, this paper will provide a brief background of the case before analyzing each of these issues in turn, evaluating the Court's reasoning and its implications for the broader framework of competition law. It will also offer recommendations for improving the Draft Article 102 Guidelines, focusing on how the Commission can effectively incorporate this judgment's findings.

II. Facts and context

On 13 May 2009, the European Commission fined Intel over a billion euros for breaching Art. 102 TFEU by implementing a strategy aimed at foreclosing its sole competitor, Advanced Micro Devices (AMD), from the x86 Central Processing Unit (CPU) market.[7] Intel provided fidelity rebates to Dell, HP, NEC, Lenovo, and retailer MSH, conditional upon their near-exclusive purchase of CPUs from Intel.[8] This strategy encompassed two forms of exclusionary abuse: conditional rebates and payments, and "naked restrictions", with each reinforcing the other's anti-competitive effects.[9] The Commission found that the rebates restricted the companies' ability to source freely, effectively preventing competitors from accessing the market. Although a price-cost test was conducted to evaluate the foreclosure effect of the rebates, the Commission emphasized it was unnecessary, relying instead on settled case law that requires only proof that the conduct was capable or likely to restrict competition, qualifying as anti-competitive by object under Art. 102.[10]

On appeal, the GC upheld the European Commission's decision regarding Intel's fidelity rebates, reaffirming settled case law under Art. 102 TFEU.[11] The GC ruled that the Commission was not required to prove a causal link between the practices and actual market effects or to conduct a price-cost test to establish an infringement. It distinguished three categories of rebates: lawful quantity rebates, inherently anti-competitive "exclusivity rebates" granted on the condition of near-exclusive

[7] *Intel* (Case COMP/37.990) Commission Decision [2009] OJ C227/13 (hereinafter Commission Decision).
[8] ibid para 895.
[9] ibid para 917.
[10] ibid paras 922–23.
[11] Case T-286/09 *Intel v Commission* [2014] ECR II-547.

sourcing from the dominant undertaking, and "other rebate systems" linked to non-exclusivity conditions requiring a case-specific assessment of foreclosure effects. The GC confirmed that the exclusivity rebates granted to Dell, HP, NEC, and Lenovo fell into the second category, allowing anti-competitive effects to be presumed without analysis of actual effects.

The Court clarified that the AEC test might be necessary for assessing price-based abuses but was not relevant to exclusivity rebates, where the exclusionary nature stems from the condition of exclusivity rather than the rebate amount.[12] The GC considered the relevance of the coverage of the practices in consideration and concluded that even a small further weakening of the degree of competition may constitute an abuse of dominant position in markets where the structure of competition is already weakened by the mere presence of a dominant company but also to due to the "special responsibility" that such a dominant firm.[13] Furthermore, it considered the possibility of terminating contracts or switching suppliers irrelevant if financial incentives effectively deterred customers from doing so.[14]

In its 2017 judgment, the CJEU overturned the GC's decision, finding that it had failed to adequately consider Intel's evidence that its rebates, within the specific economic and legal context, were not capable of having exclusionary effects, and remitted the case for further examination of these arguments.[15] The CJEU reiterated that the purpose of Article 102 TFEU is to protect effective competition, emphasizing that only conduct leading to the exclusion of an equally efficient competitor should be deemed abusive.

The CJEU further elaborated that while fidelity rebates by dominant firms generally carry a presumption of abuse, this presumption can be rebutted if the defendant provides evidence showing that the conduct is not capable of restricting competition – the possibility that was already established under Art. 101 TFEU.[16] The Commission is then required to analyze all relevant circumstances, including market dominance, coverage, duration, and conditions of the rebate scheme, as well

[12]ibid para 144.
[13]ibid para 116.
[14]ibid para 113.
[15]*Intel I*. The naked restrictions were left untouched by the Court of Justice as Intel did not appeal this part of the judgment.
[16]Case C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, paras 140 and 143; Case C-67/13 P *Groupement des Cartes Bancaires v European Commission* [2014] ECR I-2204, para 69.

as any strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.[17]

Importantly, the Court stressed that if the Commission includes a price-cost analysis in its assessment, this analysis becomes a critical component of its decision.[18] The GC, therefore, erred procedurally by not addressing Intel's challenges to the price-cost test. Consequently, the case was remitted to the GC to ensure procedural fairness and uphold the right of defence. However, the CJEU upheld the GC's findings on naked restrictions, which were not subject to annulment.

In its 2022 judgment in Intel, the GC annulled the European Commission's decision due to a critical procedural error: the failure to properly address Intel's arguments challenging the Commission's AEC analysis, which was applied to assess the legality of loyalty rebates.[19] The GC upheld the classification of the rebates as "exclusivity rebates".[20] Drawing on the CJEU's 2017 judgment, the GC reiterated that while the presumption of illegality for fidelity rebates stands, the Commission must consider any evidence submitted by the dominant firm rebutting the presumption. If such evidence is presented, the Commission is obligated to assess the foreclosure effect based on criteria outlined in the CJEU's 2017 decision, including the dominant position's extent, market coverage, duration, and potential exclusionary strategy.[21]

The GC found that Intel's evidence undermined the accuracy of the Commission's AEC analysis, identifying significant errors in the calculation of contestable shares and the value of conditional rebates.[22] Specifically, the Commission's conclusions regarding the foreclosure effects of rebates granted to Dell, HP, Lenovo, NEC, and MSH failed to meet the requisite legal standard due to flawed methodologies and errors in the calculations. Additionally, the GC held that the Commission inadequately evaluated two of the five required foreclosure criteria as set out in paragraph 139 of the *Intel I* judgment, namely: market share covered and the rebate schemes' duration.[23]

The latest judgment of the CJEU in the *Intel* case confirmed that it is the European Commission's responsibility to prove the elements of an infringement under Article 102 TFEU to the requisite legal standard.[24]

[17]*Intel I*, para 139.
[18]ibid paras 141–42.
[19]Case T-286/09 *Intel v Commission*, RENV (hereinafter Intel – Renvoi).
[20]Intel – Renvoi, para 97.
[21]ibid para 119.
[22]ibid paras 412–457.
[23]ibid para 521.

This includes providing sufficient reasoning in its decisions to establish that the conduct in question constitutes an abuse of a dominant position. The Court affirmed that under Article 263 TFEU, EU Courts can only review the legality of the Commission's decision based on its stated reasoning and cannot substitute or provide alternative justifications.[25] Next, it reaffirmed the principles set up in the *Intel I* judgment that the purpose of Article 102 TFEU is to protect effective competition, emphasizing that only conduct leading to the exclusion of an equally efficient competitor should be deemed abusive. Furthermore, it also reiterated that when a dominant firm provides evidence to support its claim that its conduct was not capable of producing foreclosure effects, the Commission is obligated to conduct a detailed analysis. This analysis must include an assessment of the dominant firm's market position, the share of the market affected by the contested practice, the duration and magnitude of the rebates, and any indications of a strategy designed to exclude equally efficient competitors.[26] However, the CJEU stated that the AEC test is a general rule used to assess whether loyalty rebates by a dominant company could exclude an equally efficient competitor.

The Court highlighted that the Court of Justice's decision to remit the case to the GC was based on the fact that the Commission had conducted an AEC test to assess the capability of Intel's rebates to restrict competition, which allowed the GC to reevaluate the contested rebates by examining Intel's arguments, which alleged significant errors in how the Commission applied the AEC test.[27] The Court concluded that the GC was correct in annulling parts of the Commission's decision due to errors in the Commission's application of the AEC test and its failure to adequately assess the share of the market covered by the rebates and the duration of the rebate schemes.[28] The Court emphasized that it was not within its role to reevaluate whether the rebates could have foreclosed competitors based on factors other than those initially relied upon by the Commission, as such reasoning was not coherently presented in the decision and could not independently support its conclusions.

The Court emphasized that the GC could not assess whether Intel's contested rebates were capable of foreclosing an equally efficient competitor by relying on factors not originally used by the Commission.[29]

[24]ibid para 332.
[25]*Intel II*, para 329.
[26]ibid para 331.
[27]ibid para 334.
[28]ibid para 337.
[29]ibid para 338.

Specifically, the GC could not substitute its own reasoning or rely on alternative justifications if those justifications were not coherently set out in the Commission's decision, as this would exceed the scope of judicial review under Article 263 TFEU.[30] Furthermore, the CJEU dismissed the Commission's argument that the fact that AMD was an efficient competitor due to its high-performance and innovative products, was not sufficiently considered by the GC, was deemed irrelevant.[31]

Finally, the CJEU clarified that the AEC test is a hypothetical exercise that evaluates whether a competitor as efficient as Intel, in terms of producing and delivering x86 CPUs of comparable value, could be foreclosed by the contested rebates.[32] It held that the analysis does not depend on AMD's actual ability to stay in the market. Instead, it seeks to determine the capability of Intel's rebates to foreclose a hypothetically efficient competitor. The test may conclude that the rebates breached Article 102 TFEU by foreclosing such a competitor, even if AMD itself was not foreclosed, or it may find no foreclosure effect regardless of whether competitors like AMD were marginalized or exited the market. Based on these findings, the Court rejected the Commission's appeal and upheld the GC's annulment of the contested parts of the Commission's decision.[33]

III. Analysis of *Intel II* judgment

3.1. The presumption of illegality

The Court reaffirmed that the presumption of illegality established in the old case law, particularly *Hoffmann-La Roche* remains.[34] However, it clarified that this presumption is rebuttable if the dominant undertaking presents evidence during the administrative procedure suggesting that its conduct was not capable of restricting competition. In that situation, the Commission is obligated to conduct a detailed analysis to assess the actual capability of the conduct to harm competition. This invites first a reminder of the old case law to understand the origins and implications of this presumption and to assess if the framework established in *Hoffmann-La Roche* is still a good law before exploring the conditions under which the presumption can be rebutted and its practical implications.

[30]ibid para 339.
[31]ibid para 342.
[32]ibid para 343.
[33]ibid para 344.
[34]ibid para 330. The Commission also takes that view in the Draft Article 102 Guidelines that exclusivity rebates are presumed to have exclusionary effects.

The presumption of illegality stemming from that case law has been interpreted as treating fidelity rebates as abusive *per se*, adopting a very strict approach to prohibiting this type of practice regardless of whether they generate actual or probable anti-competitive effects on the market. Indeed, the earlier case law considered fidelity rebates as anti-competitive "by object" and established a framework where their effects need not be examined. However, a closer look at this old line of case law reveals that the EU Courts developed the presumption of illegality of fidelity rebates under specific conditions. Looking at the case law pre-*Intel I*, it can be seen that in all cases, the dominant companies held a strong dominant position and a position of an unavoidable trading partner, which meant that customers were dependent upon the dominant company's product and competitors were not able to compete for the customers' whole demand.[35]

The Commission and the EU Courts considered that, in a market where competition is already restricted because of the presence of a dominant company, only part of the market is open to competition due to the unavoidable trading partner status of the dominant company. Additionally, in such markets, the dominant company has a special responsibility not to allow its conduct to impair undistorted competition.[36] Consequently, any further agreements between the dominant company and its customers that induce customers through financial advantages to purchase additional volumes from it were designed to prevent customers from obtaining their supplies from competing producers.[37] As such, such agreements aimed to strengthen a company's dominant position through anti-competitive means.[38]

The EU Courts identified two main categories of anti-competitive rebates – rebates linked to exclusivity obligations, which were condemned as abusive "by object", and rebates that have a fidelity-enhancing effect, for which an assessment of all the circumstances in order to evaluate their effect is required.[39] This approach mirrors the well-established

[35] *Hoffmann-La Roche*, para 41; *Case C-322/81 NV Nederlandsche Banden Industrie Michelin v Commission (hereinafter Michelin I) EU:C:1983:313*, para 56; *Case T-219/99 British Airways plc v Commission [2007] ECR I-2331 (hereinafter British Airways)*, para 75; *Case C-549/10 P Tomra Systems ASA and Others v Commission (hereinafter Tomra) EU:C:2012:221*, para 269.
[36] *Michelin I*, para 57.
[37] *Hoffmann-La Roche*, para 89; *Michelin I*, para 71; *Case C-310/93 P BPB Industries plc and British Gypsum Ltd v Commission [1995] ECR I-865 (hereinafter British Gypsum)*, para 90; *Tomra*, para 70.
[38] *Tomra*, para 13.
[39] This approach closely aligns with the categorization in the Commission's new draft Article 102 Guidelines, which differentiate between types of conduct by assigning distinct evidentiary burdens that recognizes the different degrees of risk posed by different forms of abuse. See on this point M

dichotomy in competition law between restrictions "by object" and "by effect", drawing inspiration from the case law under Article 101(1) TFEU.[40]

The legal standard aimed to identify whether they have a fidelity-enhancing effect – a feature that makes them anti-competitive in similarity to fidelity rebates linked to exclusivity. The EU Courts ultimately seemed to hold all rebates that have a fidelity-enhancing effect are abusive in general unless justified by any efficiency considerations. However, the EU Courts set a very low threshold above which every form of fidelity rebate was equated to exclusive dealing and condemned as abusive with no further evaluation of their effect. The rationale behind this strict standard is a presumption that there is a certain degree of probability that the practice will have an anti-competitive effect and as such, there is no need for the effects to be shown.

In short, the EU Courts were perceived as applying a very strict rule akin to a *per se* prohibition against all forms of rebates, that were linked to exclusivity or had fidelity-enhancing effects. The fidelity-enhancing effect was considered to be due to the fact that rebates were retroactive, granted by a dominant company with an unavoidable trading partner status, for the long reference period. To assess the validity of the rationale behind this strict approach, we must understand under which circumstances fidelity rebates can have anti-competitive effects by looking at the economic theory of exclusion.

3.2. Does the logic behind the strict presumption align with economic theories of exclusion?

The economic theories discussing anti-competitive exclusion do not contain any of the types of classification of rebates made by the EU Courts.[41] Instead, the economic literature referring to a situation in which the dominant company is offering discounts to its customers in order to induce them to sign exclusive contracts suggests that the rebates are granted for all units purchased, which is mathematically the same as offering fidelity/retroactive rebates. Next, the economic literature

Marinova, The European Commission's Draft Article 102 Guidelines Under Fire: Examining the substance and the roots of the Criticism.

[40]On that point see Pablo Ibanez Colomo who claims that he principle that Articles 101 and 102 TFEU must be interpreted consistently, **On the Article 102 TFEU Guidelines (II): 'naked restrictions' (or 'by object' abuses)** >accessed 3 December 2024.

[41]This section is based on previously published research of this author, see M Marinova, *Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test* (Wolters Kluwer, 2018) ch 4.

distinguishes between rebates with buyer commitment to purchase exclusively from the dominant company (which corresponds to exclusivity rebates) and without buyer commitment to purchase exclusively (which corresponds to the "other" category of rebates). All types of rebates have been referred collectively to as "fidelity rebates" with the clarification that these variations do not play a significant role in their analysis.[42]

The review of the economic literature revealed that fidelity rebates could have anti-competitive effects only under certain circumstances. Likewise, rebates may have efficiency justifications that need to be taken into account. First, if rebates are linked to an obligation for the customer to buy exclusively all or a significant amount of their requirements from the dominant company they are more likely to be perceived as anti-competitive if (1) the dominant company is an unavoidable trading partner and (2) a significant part of demand is non-contestable due to the characteristics of the product, (3) rebates are retroactive, there are (4) economies of scale and (5) barriers to entry.

Under these circumstances, only a small part of demand is open to competition, i.e. the contestable part. If a dominant company ties some part of the contestable share with fidelity rebate agreements, it might deprive a competitor of achieving minimum efficient scale (MES) and competing effectively. The naked exclusion literature provides a theoretical foundation as to why rebates are anti-competitive under these circumstances, which suggests that if these circumstances exist, they are enough for a *prima facie* prohibition in the absence of efficiencies. These circumstances fit the fact pattern of the pre-*Intel I* case law dealing with exclusivity rebates.[43]

Secondly, if fidelity rebate agreements do not contain commitments that customers will purchase their entire requirement from the dominant company, but instead are conditional on the achievement on a specific threshold (target/growth rebates) or a certain share of customers' requirements, they nonetheless may have anti-competitive effects (according to the EU Courts terminology – "fidelity-enhancing" effects) even if customers remain free to buy some part of their demand from competitors under the same circumstances relevant for fidelity rebates with buyer commitment for exclusivity.[44] However, the EU Courts

[42]Greenlee and Reitman, 'Distinguishing Competitive and Exclusionary Uses of Loyalty Rebates' (2005) 50(3) The Antitrust Bulletin 441, 442.
[43]*Hoffmann-La Roche* and *British Gypsum*.
[44]*Michelin I* and *II, Irish Sugar, British Airways* and *Tomra*.

considered that only if exclusivity obligations are not explicit, the effects of rebates require an evaluation of the abovementioned circumstances.

Next, the review of the literature showed that the clear-cut categorization of rebates made by the EU Courts makes sense only as a starting point for the consideration of which category of rebates is more likely to create an anti-competitive effect and as such deserves more scrutiny. However, it does not make economic sense, because regardless of the types of rebates, the relevant economic theories identify that only under a certain set of circumstances can the conclusion that fidelity rebates are anti-competitive be supported. Although the economic literature provides various models with different sets of variables and settings, which might lead to difficulties in reconciling which one is applicable to the fact pattern of each of the pre-*Intel I* case law, it is safe to assume that anti-competitive effects are more likely if the dominant company has significant market power, the product is essential for the customers, rebates are retroactive, and there are substantial economies of scale in manufacturing.[45] It can also be concluded that, even with the variations of the assumptions used in the economic models, they nonetheless arrived at similar conclusions – namely, that fidelity rebates could have an exclusionary effect and that exclusion is possible without profit sacrifice when the dominant company can deprive its rivals' access to crucial sales or input, which causes them to raise their price and it hinders their ability to compete. Based on this, it can be concluded that the economic literature identifies specific conditions under which rebates are inherently anti-competitive, and these align with the fact patterns established in case law, supporting the rationale for the presumption of the illegality of fidelity and exclusivity rebates.

However, the CJEU clarified that although the presumption stands, in case the dominant company submits evidence during the administrative process that its conduct was not capable of producing anti-competitive effect, then the Commission is under an obligation to evaluate all the circumstances listed in paragraph 139 of the *Intel I* judgment including a strategy to exclude a competitor as efficient as the dominant company. The CJEU in *Intel I* 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

[45] Ilya Segal and Michael Whinston, 'Naked Exclusion: Comment' (2000) 90 American Economic Review 296, 297; Michael Whinston, 'Tying, Foreclosure, and Exclusion' (1990) 80 American Economic Review 837, 839; Dennis Carlton, 'General Analysis of Exclusionary Conduct and Refusal to Deal-Why Aspen and Kodak are Misguided' (2001) 68 Antitrust Law Journal 659.

Intel raised it as a defense.[46] In addition, the Court in the *Intel I* judgment did not rank the factors in paragraph 139, which suggests that their importance may vary by case.[47] It did not clarify whether they are exhaustive or whether additional factors may apply.[48] However, in *Intel II*, the CJEU expanded on its earlier approach by asserting that, as a general rule, the capability of rebates to foreclose an equally efficient competitor – one assumed to incur the same costs as the dominant undertaking – must be assessed using the AEC test.[49] The following section will critically evaluate this statement.

3.3. Can the AEC test be considered a general rule for evaluating fidelity rebates under Article 102 TFEU?

After the statement that the AEC test is a general rule for the assessment of fidelity rebates, 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 considered the AEC test as a price-cost test. At the same time, the CJEU recognized that the test is "merely one of the ways of assessing whether an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition".[50] This raises an inherent contradiction: if the AEC test is only one of several possible assessment methods, how can it simultaneously be regarded as a general rule? Such inconsistency in the judgment leaves significant questions about the proper role of the AEC test in the broader framework of competition law. The following part of this section will critically analyze the inconsistencies in the judgment's treatment of the AEC test.

The statement that the AEC price-cost test is a general rule for the assessment of whether loyalty rebates by a dominant company could exclude an equally efficient competitor is fundamentally flawed. Firstly, it conflicts with other strands of case law for example, the *Post Danmark II* judgement, where the CJEU deemed the price-cost test

[46]M 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.

[47]JS 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 17283.

[48]Their relevance will be analysed in Section 4, discussing the evidence needed to rebut the presumption.

[49]*Intel II*, para 181.

[50]*Intel II*, para 181.

irrelevant due to the market's inability to support a competitor as efficient as Post Danmark, noting that even less efficient competitors could still constrain the dominant company. Additionally, the Court held that applying the AEC test is not a mandatory requirement for finding abuse, as there is no legal obligation to use it.[51] In the *Intel I*, the CJEU clarified that the price-cost test is not an indispensable part of the assessment in examining the foreclosure capability of rebate scheme, 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 scheme. More recently, in *Google Android*, 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, but did so without clarifying whether this test is always necessary.[52]

On the other hand, an alternative line of case law rejects the application of the price-cost test as inappropriate in cases of non-pricing practices, such as fidelity rebates that can resemble exclusivity agreements focused on contractual exclusivity rather than pricing alone. The GC reached this conclusion in the *Google Shopping* case, holding that the application of the AEC price-cost test is warranted only in the case of pricing practices (e.g. predatory pricing or margin squeeze) and was thus irrelevant in the particular case.[53] On appeal, the CJEU agreed with the GC position and concluded that the GC did not err in law in holding: "first, that such a test was not mandatory in the context of the application of Article 102 TFEU and, second, that, in the circumstances of the present case, that test was not relevant".[54]

Next, in the *Unilever* judgment, the Court clarified that the price-cost test would "be inappropriate in particular in the case of certain non-pricing practices, such as a refusal to supply, or where the relevant market is protected by significant barriers".[55] More recently, the GC judgment in *Google AdSense* confirmed that in markets with significant barriers to entry and substantial exclusivity arrangements, the exclusionary effects can be assessed without relying on the price-cost test, which is irrelevant in such contexts.[56] This perspective indicates again that the Court considers the AEC test as a price-cost test applicable primarily

[51] *Post Danmark II*, paras 55–58.
[52] *Google and Alphabet v. Commission (Google Android)*, paras 640–641.
[53] Case T-612/17 *Google LLC and Alphabet, Inc. v Commission (Google Shopping)* EU:T:2021:763, para. 583.
[54] *Google Shopping*, para 269.
[55] *Unilever Italia*, paras 56–60.
[56] Case T-334/19 *Google and Alphabet v Commission* (hereinafter *GoogleAdSense*) ECLI:EU:T:2024:634.

in a price-cost context. Indeed, in cases of pricing practices such as margin squeeze, the price-cost test is considered a requirement rather than an optional tool, given its established role in determining whether conduct aligns with "normal" competition.[57] This position has been reflected in the Draft Art. 102 Guidelines.[58]

Further, the CJEU clarified that in the context of price-related exclusionary practices – such as loyalty rebates, selective or predatory pricing, and margin squeezes – the possibility of replication is assessed using the "as-efficient competitor" test.[59] 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, yet the Court did not address this differentiation.

Looking at the economic literature of exclusive dealing, it looks like fidelity rebates can take many different forms. However, fidelity rebates, particularly when tied to exclusivity obligations or combined with other contractual obligations conditioned on exclusivity, function as de facto exclusive dealing arrangements and are more accurately categorized as non-price conduct rather than as price-based exclusion. In the *Intel* case, fidelity rebates functioned as retroactive rebates. This means that when customers made additional purchases above a specified threshold, the lower price applied not only to those extra purchases but also retroactively to all units purchased up to the threshold. This condition creates a stronger inducement (compared to incremental rebates) for the customers to commit purchases, preferably from the dominant supplier, thus, enhancing loyalty. This strategy becomes particularly relevant if the dominant company is an unavoidable trading partner, as customers already depend on the company for a substantial portion of their requirements. In that regard, the exclusionary mechanism (called loyalty-building effect) associated with fidelity rebates is not based on the price. In addition, there is a line of case law that provides sufficient clarification that distinguish price from non-price conduct. The 2014 GC's judgment in *Intel* classified the Intel's rebates as exclusivity rebates, which was confirmed in its 2022 decision. This suggests that

[57]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.

[58]Para 56, *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*.

[59]ibid para 80.

the Court's approach appears flawed and inconsistent with the economic and legal distinctions between pricing and non-pricing conduct.

In addition, some arguments regarding the inapplicability of the price-cost test in cases of fidelity rebates can be found in the economic literature of exclusion. The literature identifies that the incumbent could exclude rivals without profit sacrifice under specific circumstances, which suggests that a price-cost test cannot be a relevant tool for assessing a possible anti-competitive effect. The central economic logic is that a dominant company can foreclose a substantial part of the market through fidelity rebate agreements by preventing its competitors from achieving an MES, which ultimately will result in raising their cost – an economic concept known as "Raising Rivals' Cost" (RRC).[60] In markets where achieving MES is crucial, the discounter has to target only a part of the sales open to competition that is large enough to prevent the rivals achieving MES.[61] In this sense, the rebates scheme might be used to deprive a competitors' access to sufficient scale of sales, which might in turn make them less efficient and prevent them from imposing a competitive constraint on the dominant company.[62] In those cases, whether the price for the contestable part of demand is above or below cost is not relevant, because even if a competitor can offer a price that can compensate the customer for the loss of rebates, the competitor might still not be in position to reach MES because he does not have enough scale of production. If a competitor is not able to achieve MES, its cost will rise, being higher than that of the dominant company. It makes no economic sense to compare a dominant firm's cost with the price in order to assess whether a competitor can offset the effect of rebates. Thus, with this strategy a dominant company might exclude a competitor by raising its costs without profit sacrifice.[63]

The arguments outlined above indicate that the price-cost test may not always be a suitable framework for assessing anti-competitive foreclosure, particularly when rebate schemes deprive competitors of the ability to achieve MES. These considerations further challenge the role of the price-cost test in the rebuttal process, questioning

[60] Thomas Krattenmaker and Steven Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96 Yale Law Journal 209, 234.
[61] OECD Report (2002), UK contribution.
[62] D Spector, 'Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Structured Rule of Reason' (2005) 1(1) Competition Policy Internacional 89, 110.
[63] Krattenmaker and Salop (n 60); Alden Abbott and Joshua Wright, 'Antitrust Analysis of Tying Arrangements and Exclusive Dealing' in Keith N Hylton (ed), *Antitrust Law and Economics* (ch 8, Edward Elgar Publishing 2010) 183; J Vickers, 'Abuse of Market Power' (2005) 504 The European Journal 115.

whether it holds significance as a supportive factor in determining anti-competitive foreclosure. This raises fundamental concerns about its applicability as a general rule as suggested by the CJEU in the *Intel II* judgment.

However, the most contentious aspect of the judgment lies in the Court's explanation of the AEC test as a hypothetical exercise, which looks seemingly detached from the real-world exclusion or marginalization of competitors. The Court explained that the results of the AEC test may indicate either the capability or the lack of ability to foreclose an as-efficient competitor and the result is not reflective of actual market dynamics, such as the exclusion or marginalization of real competitors.[64] This disconnect raises questions about the role of the AEC test in the overall assessment of exclusionary practices. This approach introduces significant issues, particularly regarding its utility and coherence with the requirements set out in paragraph 139 of the *Intel I* judgment, which mandates the evaluation of all relevant circumstances of the case. This was also confirmed by the CJEU in *European Superleague* where the Court stated that conduct may be categorized as *abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings … .*[65] The Court stressed that the assessment must account for the factual context, market conditions, and sector-specific characteristics. Thus, the relationship between the results of the hypothetical AEC test and this broader contextual evaluation remains unclear. If the test does not add meaningful value to the analysis or if it contradicts findings from the examination of all circumstances, its utility becomes questionable.

Additionally, the hypothetical nature of the AEC price-cost test introduces concerns about administrative burdens and costs. Conducting a detailed price-cost analysis may require significant resources, yet its output might not align with the broader evidence gathered from the contextual evaluation. If the test's results fail to enhance or even complicate the assessment of exclusionary effects, it is worth questioning whether its inclusion is justified, particularly in light of the need for efficient enforcement.

[64] *Intel II*, para 434.
[65] Case C-333/21 *European Superleague Company*, ECLI:EU:C:2023:1011, para 131.

Finally, in the *SEN* judgment, the CJEU, for the first time, acknowledged the distinction between the AEC principle, which applies broadly to all forms of abuse, and the AEC price-cost test, which is specifically relevant to pricing abuses.[66] As a general principle, the CJEU explained 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.[67] 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.[68]However, a competitor does not need to have the same cost structure as the dominant firm to impose a competitive constraint - it can compete effectively on non-price factors such as product quality, innovation, or customer service. Even less efficient rivals (in terms of cost structure) may still constrain a dominant firm, particularly in industries with high fixed costs, economies of scale, or first-mover advantages. The principle recognizes that only a competitor that can impose competitive constrain on the dominant firm poses a legitimate competitive threat, even if they are not strictly as efficient, i.e., the competitor does not necessarily have the same cost structure as the dominant firm. A firm may be as efficient in competing on non-price factors such as product quality, innovation, or customer service, even if its cost structure differs. Even less efficient rivals can impose competitive constraints, particularly in industries with high fixed costs, economies of scale, or first-mover advantages. If such a competitor is excluded, the concern is not merely about price undercutting but about eliminating a competitor that could have otherwise impose

[66]ibid para 80; AG Rantos in para 73 of his opinion explained the AEC principle as a test aims to determine whether a dominant firm's conduct would foreseeably prevent an equally efficient competitor from remaining economically viable in the market. This assessment asks if a competitor, based on information available to the dominant firm, would have had similar access to essential market resources, such as customer lists, to compete effectively. This test applies not only to pricing abuses but also to non-pricing practices, evaluating whether a competitor could realistically replicate the dominant firm's market position.

[67]*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.

[68]*Unilever Italia*, para. 37.

competitive pressure. This reinforces that the AEC principle is broader than a price-cost analysis, and competitive constraints can exist regardless of differences in cost structures. This is the AEC principle already established in the case law.[69] 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 that may be used to verify a possible exclusionary abuse.[70] Thus, the AEC principle can be considered as a general principle applicable to all forms of abusive conduct. In contrast, the price-cost application depends on the context of the conduct into consideration.

3.4. How does a procedural error shape the course of the case, and what are its broader implications?

The *Intel* case highlights a procedural issue stemming from the application of the AEC price-cost test in the Commission's decision. The decision of the Commission to implement the AEC test has led to 25 years of litigation, with the correctness of the application of the AEC test as a main issue. The 2014 GC judgment focused its assessment on the classification of exclusivity rebates, their anti-competitive potential and reaffirmed the presumption of illegality for exclusivity rebates, emphasizing that they are inherently capable of foreclosing competition due to the dominant firm's ability to leverage non-contestable demand to secure contestable shares and considered it unnecessary to evaluate the actual effects of the rebates or conduct an AEC test to demonstrate foreclosure. Consequently, the GC held that the anti-competitive potential of exclusivity rebates could be presumed without relying on the AEC test and did not review the correctness of the test conducted by the Commission (which was contested by Intel) and did not address whether the results of the AEC test – even if applied correctly – could serve as a supportive or decisive factor in determining an infringement of Article 102 TFEU.

In an ideal scenario, the GC should have critically assessed the correctness of the AEC test as part of its judicial review. By evaluating whether the test was properly applied and whether its methodology was sound, the GC could have provided a definitive conclusion on the applicability of the

[69]M Marinova, 'The EU General Court's 2022 Intel Judgment: Back to Square One of the Intel Saga' (2022) 7(2) European Papers – A Journal on Law and Integration 627.

[70]M 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' (n 46) See, in general, Marinova, *Fidelity Rebates in Competition Law* (n 41).

test. However, even if the GC had found the AEC test to be flawed or incorrect, it should have emphasized that this would not change the ultimate assessment of Intel's conduct. This is because the results of the AEC test are not outcome determinative; the anti-competitive nature of fidelity rebates can still be established through other evaluative criteria. This could have been aligned with the *Post Danmark II* judgment, where the CJEU clarified that the AEC test is neither legally required nor decisive for establishing an abuse. Similarly, in the *Google Shopping* case, the CJEU agreed with the GC's position, emphasizing that such a test is not mandatory under Article 102 TFEU and, in certain contexts, may not even be relevant.

The GC could have further elaborated on whether the AEC test adds meaningful value to the overall analysis of exclusionary practices or, in other words, whether the test offers insights that outweigh the evaluation of other relevant circumstances, such as the dominant firm's market position, the share of the market affected, or the structure of the rebate schemes or, in other words, all the circumstances that the CJEU listed in the *Intel I* judgment. Furthermore, does the cost of administering such a test in practice 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 minimize enforcement errors but also to be easy to administer in terms of the limited resources of national competition authorities and courts. On this point, in her Opinion in *Post Danmark II*, AG Kokott 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 price-cost test is appropriate to evaluate anti-competitive effect of fidelity rebates (not in general), given the cost of administering in practice and whether it justifies the resources for its implementation, considering the fact that the test is not a legal requirement.

The *Intel I* judgment overturned the GC's initial decision on the grounds that it had failed to adequately address Intel's evidence, which argued that its rebates, when evaluated in their specific economic and legal context, were not capable of producing exclusionary effects. The CJEU emphasized that if the Commission incorporates a price-cost analysis into its decision, that analysis becomes a crucial element that must be assessed by the court. The GC's failure to engage with Intel's challenges to the AEC test represented a procedural error that undermined the defendant's right of defence. Consequently, the case was remitted to the GC for proper consideration of Intel's arguments. The CJEU did not consider is whether the results of the test, even if applied correctly, can be a supportive or decisive factor in finding an infringement of Article 102.

In its 2022 judgment, the GC annulled the Commission's decision, which was justified only by one single error resulting from the failure to take into consideration, in its initial judgment, Intel's arguments that challenge the Commission's AEC analysis, which was applied to test the legality of the loyalty rebates.[71] The GC concluded that the Commission made an error in its application of the AEC price-cost test, affecting, in particular, the calculation of the contestable share of demand (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. It also clarifies that the price-cost AEC test is not an indispensable part of the assessment in examining the foreclosure capability of rebate scheme, 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 scheme. This statement adds complexity to the case, as the GC continued to address a test that had been conducted by the Commission for completeness, which was not an essential part of the assessment and did not contribute value to the overall evaluation of the conduct.

The GC did not consider how the results of the test, 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 that the Court was expected to address is "should the Commission have been using the price-cost test at all in this particular case?"[72] However, the GC failed to address these questions, simply because was following the framework set out by the CJEU.

In contrast to its previous judgment in *Intel*, the GC's 2022 *Intel* ruling did not differentiate between price and non-price abusive practices. It failed to clarify that the AEC price-cost test might be essential for

[71]For critical analysis of the judgment see M. Marinova, Back to square one on the Intel Saga (n 69).

[72]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 <www.linkedin.com/pulse/almost-exsanguinated-corpse-aec-other-crimes-intel-sagadavidfoster/?trackingId=LMJbwuwmWDgzqa%2BwmTIaDQ%3D%3D>

evaluating price-based abuses but not be applicable to exclusivity rebates. Additionally, the GC did not thoroughly assess the coverage and duration of Intel's 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 being appropriate for identifying an abuse. In essence, the GC 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 price-cost test conducted by the Commission. This is how courts procedural mistake shift the focus from clarifying the assessment of rebates on substance to evaluation of the correctness of a price-cost test that is not even part of the legal assessment. Moreover, for non-price abuses the price cost test is not applicable and non-appropriate 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. 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. Arguably, the case law has long recognized that some forms of conduct can be exclusionary without involving below-cost pricing.[73] 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.[74] As a result, the Intel judgment only clarifies that if the Commission applies the test and the defendant contests it, then an evaluation of its correctness becomes necessary. However, it leaves unanswered whether, if the Commission decides not to conduct the test and the defendant submits evidence based on the test, the Commission would be obligated to perform the test or simply to substantiate why the test is not applicable, as seen in the Google Shopping case. Having in mind that defendants in dominance cases routinely raise such defense, the clear message of the Court is that all the arguments put forward by the defendant must be assessed, which means that even if the analysis leads to the same conclusion, its findings have to be based on the assessment of all the circumstances.

[73]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.

[74]M Marinova, 'Should the Rejection of the "as Efficient Competitor" Test in the *Intel* and *Post Danmark II* Judgments Lead to Dismissal of the Effects-Based Approach?' (2016) 12(2–3) European Competition Journal 387.

IV. Practical significance – rebutting the presumption of illegality: criteria and challenges

The judgment clarifies that the presumption of illegality may be rebutted if the dominant undertaking submits evidence during the administrative phase showing its conduct was not capable of restricting competition or causing foreclosure effects. In such cases, the Commission must analyze factors such as the undertaking's dominance, affected market share, rebate conditions, duration, coverage, and any exclusionary strategy. However, the judgment leaves a key question unanswered: what specific evidentiary threshold must a dominant undertaking meet to trigger the Commission's additional obligation to conduct this analysis? The Court merely requires the submission of evidence to be during the administrative process but does not define the material standards or qualitative requirements for such evidence. This question is particularly significant, as defendants in dominance cases routinely raise such defences, making it crucial to clarify the type and standard of evidence required.

In that regard, the *Intel I* judgment offers valuable insights into the type of evidence dominant firms can present to challenge claims that their conduct has anti-competitive effects. Factors such as the relative market position of the dominant firm, the market share impacted by the practice, and the specific conditions of agreements with customers (e.g. duration of exclusivity or the magnitude of rebates) are particularly relevant. Rebutting the presumption of capability to restrict competition would require a similar level of evidence that the dominant company have to satisfy, such as, a short reference period and a possibility for a customer to breach the contract without penalty, evidence that the dominant company is not an unavoidable trading partner and competitors are able to compete for the whole demand, instead of only for the contestable share and that rebates are not retroactive but incremental.[75] If the dominant company is unavoidable trading partner, evidence that the contestable share of the market is sufficient to allow a rival to reach MES can also be used.[76] This means that a dominant firm might effectively argue that an exclusive dealing arrangement covering only small part of the relevant market is unlikely to result in exclusionary effects, particularly if an equally efficient competitor can still achieve minimum efficient scale

[75] Pablo Ibáñez Colomo, 'The Future of Article 102 TFEU After *Intel*' (2018) 9(5) Journal of European Competition Law & Practice 293.
[76] D Ridyard, 'Exclusive Contracts and Article 82 Enforcement' 594.

and continue to compete effectively.[77] If the evidence demonstrates a combination of factors such as the undertaking's significant market dominance, the retroactive nature of the rebates, their extensive duration and market coverage, and the presence of an exclusionary strategy, this can provide sufficient grounds for the Commission to presume an anti-competitive effect. This approach aligns with the pre-*Intel* case law. It reflects the principles outlined in the Draft Article 102 Guidelines, where the cumulative presence of such conditions is treated as indicative of likely harm to competition, thereby reducing the burden of requiring a detailed effects-based analysis in every case.

Regarding the application of the AEC price-cost test, while not mandatory, it remains an important analytical tool for assessing conduct under Article 102 TFEU, provided its relevance and appropriateness are carefully evaluated in light of the specific facts and the economic reality of the case. Jurisprudence demonstrates a clear spectrum regarding its applicability. On one end lie "classic" price-based abuses, such as predatory pricing and margin squeeze, where the AEC test is particularly well-suited to determine whether a competitor as efficient as the dominant firm could replicate the pricing strategy. On the other end are non-price abuses, such as exclusivity arrangements or conduct on markets with significant barriers to entry, where the test becomes less helpful or even entirely irrelevant. This distinction highlights that the AEC price-cost test cannot be applied uniformly across all forms of abusive conduct. Importantly, if a dominant company introduces the AEC price-cost test during administrative proceedings as evidence to contest the anti-competitive effects of its conduct, it should do so only when the test is relevant to the specific facts of the case. This is especially true for pricing abuses, where the test may serve as a meaningful benchmark. Conversely, in non-price abuse cases, reliance on the price-cost test may add little value, as it fails to capture the exclusionary mechanisms operating independently of pricing dynamics.

From this perspective, it can be assumed that the settled case law of fidelity rebates was not overruled explicitly by the CJEU in *Intel* but now it is clear that this presumption can be rebutted if the dominant company can provide supportive evidence; the possibility that was already established under Art. 101 TFEU.[78]

[77] Colomo, 'The Future of Article 102 TFEU After *Intel*' (n 75).
[78] Case C-429/08 *Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083, paras 140 and 143; Case C-67/13 P *Groupement des Cartes Bancaires v European Commission* [2014] ECR I-2204, para 69.

However, in the *Intel* case, had the decision been decided on a substance, Intel would have faced difficulties in rebutting the Commission's findings of the existence of a strategy aiming to exclude an as efficient competitor considering all the circumstances and a combination of facts based on: (1) the existence of the "naked restrictions" (which was not subject to appeal);[79] (2) the unwritten conditions regarding the launch of Intel's customers x86 CPUs AMD-based products (3) the fact that the agreements were kept secret and Intel requested the wording "non-exclusive" to be introduced into the agreement for optical purposes and (4) the fact that Intel introduced the rebate strategy, to overcome its inability to produce a timely technical response to AMD's 64-bit x86 CPUs (suggesting that AMD was imposing a competitive constraint on Intel, irrespective of its cost efficiency). These findings collectively might suggest a clear and deliberate strategy by Intel to exclude a competitor that was imposing an effective competitive constraint on its dominance – a principle aligned with the exclusion of a competitor as efficient as the dominant company, also known as the AEC principle, irrespective of the competitor's cost structure.[80] In summary, the dominant company must demonstrate, with robust evidence, specific factors that negate the likelihood of anti-competitive foreclosure.

V. Conclusion

The *Intel II* judgment reaffirms established principles under Article 102 TFEU but leaves significant questions unanswered. While it confirms the possibility of rebutting the presumption of illegality for fidelity rebates, it fails to clarify what specific evidentiary threshold a dominant firm must meet to trigger the Commission's obligation to conduct a detailed analysis. This lack of clarity creates uncertainty for the practical application of Article 102. To address this, the Commission should provide detailed guidance in its Draft Article 102 Guidelines, specifying the evidence required to rebut the presumption. Factors such as the degree of dominance, market coverage, rebate conditions, and the absence of exclusionary intent must be clearly outlined. Providing clear guidance will promote legal certainty and ensure that enforcement aligns with the principle of competitive neutrality. Next, the judgment

[79]On 22 September 2023, the European Commission re-adopted portions of its 2009 *Intel* decision and imposed a fine of €376 million on Intel for abusing its dominant position in the x86 central processing unit (CPU) market through the use of naked restrictions.
[80]Marinova, *Fidelity Rebates in Competition Law* (n 41).

offers mixed signals regarding the application of the AEC price-cost test in exclusionary abuse cases. The judgment confirmed its position from *Intel I*, that the accuracy of the AEC price-cost test must be reviewed, as it was included in the Commission's decision and directly contested by the defendant with evidence questioning its correctness, which is a procedural requirement imposed to the GC.[81] However, the judgment fails to provide a clear framework for assessing fidelity rebates or the substantive role of the price-cost test, including how the test results should be balanced against other factors outlined in paragraph 139 of the *Intel I* judgment. This leaves the treatment of fidelity rebates – one of the most complex and unsettled areas of competition law – ambiguous. Additionally, it is important to consider the Court's limited role in reviewing the legality of the Commission's decisions and its inability to replace the Commission's reasoning with its own, as the Commission is the author of the contested decision. The primary issue in the *Intel* case stems from the Commission's erroneous decision to apply the price-cost test, a methodology ill-suited for assessing fidelity rebates, which are more appropriately classified as non-price conduct. Instead of addressing whether the Commission should have applied the test at all, the Court reviewed its procedural correctness, as the test was included in the Commission's decision and challenged by the defendant. This focus shifted attention away from the broader issue of how fidelity rebates should be assessed under Article 102 and the applicability of the price-cost test in this case. Instead, it centred on a procedural error that led to the annulment of the Commission's decision, missing an opportunity to clarify one of the most complex areas of competition law – a price too high to bear in terms of administrative cost and effective enforcement.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[81]Venit (n 47) 189.