The CJEU's Interpretation of Article 102 TFEU: The Need to Assess the Effects of Rebates and the As-Efficient-Competitor Test following the Intel Judgment.

The CJEU's jurisprudence regarding the interpretation of Article 102 has attracted attention following the *Intel*[1] case. In *Intel*, the CJEU altered its approach on the need to assess the effects of rebates, the jurisprudence on which was consistently strict. This essay discusses the CJEU's jurisprudence on this topic. It does so by analysing the approach in *Hoffman La Roche,*[2] *Michelin II*[3] and *British Airways*.[4] It then engages in a discussion of the Commission's Article 102 Enforcement Priorities Guidance.[5] Then, it discusses the approach introduced in *Intel* and *Unilever*,[6] evaluating the benefits and drawbacks of both approaches. Ultimately, it argues that the jurisprudence on the need to assess the effects of rebates has largely remained consistent, but *Intel's* further clarifications on *La Roche* introduced slight changes.

Under EU competition law, rebate systems operated by dominant undertakings are addressed under Article 102(c), which prohibits the application of "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[7] While different forms of rebates exist, the Commission has primarily been concerned with exclusivity and exclusivity-inducing rebates, mainly due to their capability to exclude as efficient rivals, as well as their possible negative effects on consumers.[8]

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[1] Case C-413/14 P *Intel Corp. v European Commission* [2017].
[2] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR I-00461.
[3] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II-4071.
[4] Case T-219/99 *British Airways plc v Commission of the European communities* [2003] ECR II-5917.
[5] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45.
[6] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023].
[7] Consolidated Version of the Treaty on the Functioning of the European Union, Article 102(c) [2012] OJ C326/89.
[8] Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases and Materials* (Oxford University Press 2019).

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Prior to the *Intel* judgement, loyalty rebates were subjected to a strictly formalistic approach by competition authorities, whereby they were held to violate Article 102(c) simply by their very nature. The CJEU followed a consistent and strict approach in its jurisprudence on the matter. This position was first seen in *Hoffman La Roche*, where the CJEU held that the exclusivity rebates implemented by La Roche were intended to restrict the freedom of choice of the purchasers and to deny access to the market for other producers.[9] Therefore, such conduct was by its nature in violation of Article 102 TFEU. This judgement effectively established a per-se liability for loyalty rebates, eliminating the need for an assessment of the effects of the rebates system.

This was also seen in *Michelin II*, where the Court held that, "For the purposes of applying Art.102 [TFEU], establishing the anti-competitive object and the anticompetitive effect are one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect."[10] As this judgement follows in the footsteps of *La Roche*, this demonstrates that the CJEU's jurisprudence regarding the assessment of the effects of rebates is consistent in following a formalistic approach.

This approach was also evident in *British Airways*. In this case, the CFI (General Court) notably stated that "It can be deduced from that case-law generally that any 'fidelity-building' rebate system applied by an undertaking in a dominant position tends to prevent customers from obtaining supplies from competitors, in breach of Article 82 EC."[11] Similar to *La Roche,* this approach effectively established rebates as per se restrictions. Additionally, this statement highlights that the CFI relied on the formalistic approach in *La Roche*, demonstrating that the CJEU's jurisprudence regarding the interpretation of Article 102 is consistent.

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[9] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR I-00461.
[10] Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR II-4071, para 241.
[11] Case T-219/99 *British Airways plc v Commission of the European communities* [2003] ECR II-5917, para 248.

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The underlying principle behind the form-based approach in the jurisprudence prior to *Intel* relates to the special responsibility enjoyed by dominant undertakings "not to allow its conduct to impair genuine undistorted competition."[12] Through a consistently form-based approach, the Commission and Courts sought to prevent dominant firms from engaging in conduct that would foreclose rivals. Monti argues that this is especially true in light of the fact that the dominant undertaking is an unavoidable trading partner, making access to the market inherently difficult to obtain.[13] AG Kokott emphasised this principle in *British Airways*, arguing that the conduct of dominant undertakings must be found abusive "as soon as it runs counter to the purpose of protecting competition in the internal market from distortions," because of the special responsibility principle.[14] Therefore, the special responsibility principle underpinned the *La Roche* approach, explaining the form-based nature of this approach.

The consistency of this approach was however challenged by the Commission's Enforcement Priorities Guidance. The Guidance introduced an economics-based approach to the rebates scheme, to assess whether it is "capable of hindering expansion or entry even by competitors that are equally efficient…."[15] Under this Guidance, the assessment of effects takes the form of the as-efficient competitor test (AEC test), where the Commission must engage in a price-cost analysis. The requirement to assess the effects of the rebates distorted the consistency of the interpretation of Article 102, as it challenged the formalistic approach taken by the Courts, highlighting inconsistencies in the interpretation of this Article.

[12] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45, para 1.
[13] Monti G, 'Rebates after the General Court's Intel Judgement' [2022] TILEC Discussion Paper No. DP2022-004, p 3.
[14] Case C-95/04 P Opinion of AG Kokott, *British Airways plc v Commission of the European Communities* [2006] ECR I-02331, para 69.
[15] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45, para 41.

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Nevertheless, the Priorities Guidance remains a soft law document, which serves mostly as a guide to the Commission. The CJEU chose to ignore this Guidance in *Tomra*[16] and *Post Danmark II*,[17] which took place after the Guidance was issued. In both cases, the CJEU maintained the pre-Guidance position in *La Roche*, highlighting that the EU's jurisprudence regarding the interpretation of Article 102 is strict, formalistic and consistent.

However, the jurisprudence of the CJEU has not been entirely consistent, and the approach taken to assess the effects of rebates has proven confusing. This was evidenced with the *Intel* judgement, where the CJEU held that where dominant undertakings submit evidence to prove that the rebates are not anticompetitive, the Commission must engage in an effects analysis and cannot simply rely on their nature to find an abuse. Regarding rebates, the General Court stated that although "given [their] nature, [they] may be presumed to have restrictive effects on competition, the fact remains that what is involved is, in that regard, a mere presumption, not a per se infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to examine whether there were anticompetitive effects,"[18] clearly showing a move towards an effects analysis approach. This approach was subsequently followed in *Unilever/AGCM*, where the CJEU stated the Commission must prove, "beyond mere hypothesis,"[19] that the rebates are really capable of producing the alleged anti-competitive effects. The inconsistency and confusion created by these cases is exacerbated due to the fact that these judgements have not formally overruled the *La Roche*, but simply "clarified" it, making the jurisprudence of the CJEU regarding the interpretation of Article 102 TFEU inconsistent.

[16] Case C-549/10 P *Tomra Systems ASA and Others v European Commission* [2012].
[17] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] (*Post Danmark II).*
[18] Case T-286/09 RENV. *Intel Corporation Inc. v European Commission* [2022], para 124.
[19] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023], para 42.

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However, the *Intel* approach does not fundamentally change the interpretation of Article 102 regarding rebates, as the Commission is only obligated to conduct an effects analysis where the dominant undertaking has presented evidence disproving the alleged anticompetitive effects. While rebates are no longer per-se abusive and can be justified by the dominant undertaking, this does not introduce a fundamental change to the previous approach. Therefore, the interpretation of article 102 remains consistent.

For this approach, the CJEU relied on the as-efficient competitor principle, which was articulated in *Post Danmark I*[20] and emphasised in *Intel*.[21] Gaudin and Mantzari state that this principle attempts to differentiate between "conduct that reflects competition on the merits" and conduct that excludes competitors and harms consumers.[22] By requiring an effects analysis, the Court tries to draw a line between rebate systems that would simply exclude less efficient competitors, which reflects competition on the merits, and actually harmful schemes, which are anticompetitive and would harm consumers. The formalistic approach in *La Roche* prevented this differentiation, subsequently protecting less efficient competitors. This, as both *Post Danmark I* and *Intel* expressed, is not the objective of Article 102.[23] Therefore, the as-efficient competitor principle underlies this approach, demonstrating that the differences in the jurisprudence were due to the different principles that the Court focused on.

This difference could also be attributed to the multiple benefits and drawbacks of each approach. The formalistic approach in *La Roche* is incompatible with Article 102, as it requires an evaluation of "all the relevant circumstances."[24] Furthermore, this approach could lead to over enforcement and false

[20] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] (*Post Danmark I*), para 21-22.
[21] Case C-413/14 P *Intel Corp. v European Commission* [2017], para 133-134.
[22] Germain Gaudin and Despoina Mantzari, 'Google Shopping and the As-Efficient-Competitor Test: Taking Stock and Looking Ahead' (2022) 13 Journal of European Competition Law & Practice 125, p 126.
[23] Ibid.
[24] Case C-549/10 P *Tomra Systems ASA and Others v European Commission* [2012], para 71.

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negatives by finding all such rebate schemes anticompetitive. As stated by the CJEU in *Unilever*, "not every exclusionary effect is necessarily detrimental to competition,"[25] supporting the notion that not every loyalty-inducing rebate scheme must be found as anti-competitive per-se.

The *Intel* approach, however, could be problematic due to the use of the AEC test. Economides argues that whilst this test is better compared to some alternatives, it nevertheless fails to account for product differentiation, or the fact that even inefficient competitors constrain the dominant undertaking's pricing and increase consumer surplus.[26] Thus, the AEC could lead to an incomplete analysis.

Lastly, undertaking economic analysis tests is expensive and time consuming, requiring resources often scarce for competition authorities. This criticism was voiced by AG Kokott in *Post Danmark II*, who stated that "the added value of an expensive economic analyses is not always apparent and can lead to the disproportionate use of the resources of competition authorities and courts,"[27] demonstrating that the benefits of such an approach are not always apparent.

In conclusion, *La Roche* relied on a formalistic interpretation of Article 102 for rebates, which was based on the special responsibility principle and was consistently applied in subsequent cases. This stance only slightly changed after *Intel,* where the CJEU introduced the obligation for the Commission to engage in an effects-based analysis if the dominant undertaking presents evidence disproving anti-competitive effects. This approach does not fundamentally distort the previous one, and therefore, the interpretation of Article 102 has been largely consistent.

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[25] Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* [2023], para 37.

[26] Nicholas Economides, 'Loyalty/Requirement Rebates and the Antitrust Modernization Commission: What Is the Appropriate Liability Standard?' (2009) 54 The Antitrust Bulletin 259, p 279.

[27] Case C-23/14 Opinion of AG Kokott, *Post Danmark A/S v Konkurrencerådet* [2015], para 66.

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