Loyalty Rebates under EU Competition and US Antitrust Law

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Abstract

The present chapter investigates the antitrust rules applicable to loyalty or fidelity rebate schemes under EU competition and US antitrust law. It finds that antitrust liability for a dominant company will more readily be established in the EU, where the applicability of economics-based tests is still being navigated. In the US, rebates by a monopoly player will usually be found to be anti-competitive where they constitute predatory pricing, although they might also run into antitrust liability where they constitute exclusive dealing arrangements. This divergence can be explained by the different ideological underpinnings in the two jurisdictions. Overall, however, the (case) law on loyalty rebates is still in a state of flux in both jurisdictions. In recent years, both jurisdictions have gradually moved to a little more convergence in their treatment of exclusivity rebates. At this point, however, both the US Supreme Court and the European Court of Justice will need to weigh in on the future of the antitrust assessment of loyalty-inducing rebates.

Keywords: discounts, discriminatory practices, exclusive dealing, fidelity rebates, loyalty rebates

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I. REBATES AS A COMPETITION LAW ISSUE

When a company grants a rebate to its business partner, the latter pays a lower price for the goods or services received. As competition law generally strives for lower prices on the market, it can appear counter-intuitive to penalize rebates granted by companies with market power. However, on closer inspection the rationale that underpins the view that rebates can sometimes be anti-competitive emerges: Where a rebate is only granted based on conditions that induce loyalty or (near-)exclusivity on the buyer's side, this can foreclose the seller's competitors from access to the market, possibly even leading to the competitor's market exit that ultimately benefits the seller.[1] While loyalty discounts can help to align the supplier and the purchaser's interests, they can also prevent entry or expansion, lead to market exits, or involve below-cost pricing.[2] The question, then, turns on how to distinguish between pro-competitive rebates that competitors can compete on, and anti-competitive rebates that may constitute vehicles to foreclose a market to competitors.

The present chapter addresses this question by discussing the case law on loyalty rebates from the EU and the US. It exclusively concerns fidelity or loyalty rebates, ie 'discount schemes [that] allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make.'[3] This can also be a market-share discount that is conditioned on the purchaser obtaining a certain percentage of its needs in a product category from the supplier. In the case of loyalty rebates, the discount is usually retroactive and applies to 'all units of a single product'.[4]

Loyalty rebates may be framed as pricing abuses where the price is at the centre of the scheme, or as non-pricing abuses where the exclusionary element of a rebate scheme constitutes

[1] For an analysis of the foreclosure effects of loyalty rebates, see also Alexander Morell, Andreas Glockner and Emanuel V Towfigh, 'Sticky Rebates: Loyalty Rebates Impede Rational Switching of Consumers' (2015) 11 Journal of Competition Law and Economics 431.
[2] Christian Ahlborn and David Bailey, 'Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison' (2006) 2 European Competition Journal 101, 108–10; Roger D Blair and Thomas Knight, 'Bundled Discounts, Loyalty Discounts and Antitrust Policy' (2020) 16 Rutgers Business Law Review 123, 130.
[3] OECD, *Fidelity Rebates: Background Note by the Secretariat*, DAF/COMP(2016)5 (11 March 2016), 4.
[4] US Department of Justice, 'Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act' (Section 2 Report) (September 2008) 106 <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> accessed 18 June 2021.

its central element. The chapter does not deal with other pricing abuses, such as excessive pricing, predatory pricing or discriminatory pricing, nor with bundling rebates that have a tying element.[5]

II. REBATES UNDER EU COMPETITION LAW

Article 102 TFEU[6] prohibits the abuse of a dominant position on the relevant market. One of the types of behaviour that Article 102 TFEU lists as anti-competitive is the application of dissimilar conditions to equivalent transactions.[7] This prohibition can apply to individualised rebate schemes that are not applied across the board. Article 102 TFEU also contains a general prohibition on abusive behaviour that can be relied upon to outlaw commercial behaviour that excludes competitors from the market or exploits customers.

In early cases, both the European Commission and the EU Courts – ie, the General Court and the Court of Justice of the European Union – adopted a form-based approach towards anti-competitive rebates. This characterisation of the early cases, however, is disparaging and not very helpful to understand what forms of rebates are seen as anti-competitive and why.[8] This is even more so as these cases did indeed take a large number of economic circumstances into account, rather than just concentrating on the shape of a certain rebate scheme. In more recent cases, a more effects-based type of analysis of rebates has been applied by the European Commission and accepted by the Court of Justice. As is, however, there is no definite legal benchmark to establish whether a rebate scheme indeed contravenes Article 102 TFEU. In particular, the importance of the as-efficient-competitor test (AEC test) that the European Commission advanced in its soft law instruments requires further inquiry. this evolution in the case law as well as in the Commission's soft law is discussed below with a view to setting out the status quo of anti-competitive rebates in Europe.

[5] For these, see the respective chapters in this Handbook.
[6] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.
[7] Article 102(c) TFEU.
[8] Richard Whish, '*Intel v Commission*: Keep Calm and Carry On!' (2015) 6 Journal of European Competition Law & Practice 1, 1. Whish also points out (p 2) that the EU Courts' form-based rules on rebates are not per se rules, as the dominant company can always submit an objective justification.

A. Quantity and Loyalty Rebates in the Early European Case Law

The settled case law of the Court of Justice makes abundantly clear that the Court is not concerned about volume-based, incremental quantity rebates.[9] Pure quantity rebates are therefore not regarded as an abuse of a dominant position as long as they fulfil certain conditions. The Court has highlighted that 'a quantity rebate [should be] exclusively linked with the volume of purchases from the producer concerned'[10] and should be 'granted in respect of each individual order, thus corresponding to the cost savings made by the supplier'.[11] Quantity rebates also need to be granted on a non-discriminatory basis in order to do justice to Article 102(c) TFEU.[12]

While the Court's early case law thus clearly did not regard quantity rebates as anti-comeptitive, it has always been weary of loyalty rebates that lead to exlusive purchasing on the buyer's side. In a string of leading cases, it has regarded loyalty-inducing rebates of various kinds as an abuse of a dominant position under Article 102 TFEU. In the Court's view, share of need rebates – ie, market-share discounts that are only awarded if the purchaser obtains a certain percentage of its requirements from the dominant seller – are anti-competitive because they are 'designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market'.[13] It is this foreclosure effect that the General Court has also taken issue with.[14] The foreclosure effect does not have to have materialized; it is sufficient that the rebate 'is capable of having that effect'.[15]

Even rebates that do not contain an exclusivity criterion can be found to be anti-competitive where they induce the purchaser to remain loyal to the dominant supplier. In *Michelin I*, the Court listed a number of factors that need to be taken into account when making such an assessment, including the criteria and rules for granting the rebate, whether the rebate has a tendency to remove

[9] Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 90; Case 322/81 *Michelin v Commission* (*Michelin I*), ECLI:EU:C:1983:313, para 72.
[10] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission*, ECLI:EU:C:1975:174, para 518.
[11] Case C-23/14 *Post Danmark v Konkurrencerådet* (*Post Danmark II*), ECLI:EU:C:2015:651, para 28.
[12] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission*, ECLI:EU:C:1975:174, paras 522 f; Georg-Klaus de Bronett in Gerhard Wiedemann (ed), *Handbuch des Kartellrechts* (3rd edn, CH Beck 2016) § 22 para 95.
[13] Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, paras 89 f (direct quote at para 90).
[14] Case T-203/01 *Michelin v Commission (Michelin II)*, ECLI: EU:T:2003:250, para 57.
[15] Case T-203/01 *Michelin v Commission (Michelin II)*, ECLI: EU:T:2003:250, para 239 (direct quote); Case T-219/99 *British Airways v Commission*, ECLI:EU:T:2003:343, para 293.

or restrict the purchaser's freedom to choose its sources of supply and to exclude competitors from the market, and whether the rebate scheme applies dissimilar conditions to equivalent transactions or reinforces the seller's dominant position.[16] In *Irish Sugar*, the General Court found that a rebate scheme that specifically targets certain purchasers based on their location constitutes an abuse of a dominant position, as do fidelity rebates based on exclusivity obligations and selectively-granted target rebates.[17] In *British Airways*, the Court emphasised that in order to carry out the competitive assessment of a rebate that is neither a pure quantity rebate nor a fidelity rebate under the *Hoffmann-La Roche* case law, one needs to ascertain whether the rebate can have an exclusionary effect on competitors, as well as whether the rebate makes it more difficult or impossible for purchasers to choose between various sources of supply or commercial partners.[18]

A rebate scheme that, on its face, is volume-based, can also be designed in a way to be caught out under Article 102 TFEU: As the Court emphasised in *Portugal v Commission*, it lies in the nature of quantity rebates that purchasers of larger volumes of a product benefit from lower average unit prices, and this in itself does not make a quantity rebate scheme discriminatory. However, where a quantity rebate scheme is structured in a way that awards some purchasers 'an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors', it will be seen as applying dissimilar conditions to equivalent transactions as prohibited under Article 102(c) TFEU.[19] Where a quantitiy rebate scheme has loyalty-inducing effects, for instance because of long reference periods or because it is calculated based on total turnover rather than by an individual tranche, the General Court has held that it may not be regarded as a purely volume-based rebate scheme that does not infringe Article 102 TFEU.[20]

While the EU Courts' early case law on rebates has been called formalistic,[21] it is actually informed by the insight that loyalty-inducing rebates have a tendency to foreclose the market for competing sellers by keeping purchasers loyal to the dominant seller. However, the Court has also

[16] Case 322/81 *Michelin v Commission (Michelin I)*, ECLI:EU:C:1983:313, para 73.
[17] Case T-228/97 *Irish Sugar v Commission*, ECLI:EU:T:1999:246, paras 173–225; upheld on appeal in Case C-497/99 P *Irish Sugar v Commission*, ECLI:EU:C:2001:393.
[18] Case C-95/04 P *British Airways v Commission*, ECLI:EU:C:2007:166, para 68.
[19] Case C-163/99 *Portugal v Commission*, ECLI:EU:C:2001:189, paras 51 f (direct quote at para 52).
[20] Case T-203/01 *Michelin v Commission (Michelin II)*, ECLI: EU:T:2003:250, paras 67–95, esp para 95.
[21] See Sofia Oliveira Pais, 'Os descontos de exclusividade numa encruzilhada' in Maria Lúcia Amaral (ed), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos* (vol I, Almedina 2016) 1221.

accepted that, in exceptional circumstances, loyalty rebates may be objectively justified.[22] Therefore, the case law on rebates cannot be said to establish a per se rule for loyalty discounts.

B. Conditional Rebates in the European Commission's Guidance Paper

Over a decade ago, the European Commission rang in a more effects-based era for abuse of dominance cases with its Guidance Paper on enforcement priorities under Article 102 TFEU.[23] In a section dedicated to conditional rebates, the Guidance Paper sets out how the Commission wants to carry out the competitive assessment of 'rebates granted to customers to reward them for a particular form of purchasing behaviour', ie loyalty or fidelity rebates.[24] It sets out an as-efficient-competitor (AEC) test that is meant to assess whether a rebate scheme forecloses the market for an equally efficient competitor. Following the *Intel* saga (discussed below) and its implications for the antitrust assessment of rebates, it is notable that Commission officials have spoken up with contrary points of view, highlighting how the Commission itself is not entirely aligned on the question of the AEC test.[25]

The Guidance Paper sets the scene by differentiating between a contestable and a non-contestable share of demand for each customer. A customer's non-contestable portion of demand refers to that amount which a purchaser would in any case buy from the dominant company. The contestable portion of demand, on the other hand, relates to that amount which a purchaser may buy from another company. The Commission's concern is that a dominant company may use conditional rebates in order to leverage purchases from the non-contestable portion of demand to the contestable one.[26]

For price-based exclusionary conduct more generally, the Commission only wants to intervene where a dominant company's behaviour may dampen competition from competitors that are as efficient as the dominant company.[27] Only in exceptional circumstances will it consider

[22] Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 90.
[23] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Guidance Paper) [2009] OJ C45/7.
[24] European Commission, Guidance Paper (n 23) paras 37–46 (direct quote at para 37).
[25] See on this Nicolas Petit, '*Intel*, Leveraging Rebates and the Goals of Article 102 TFEU' (2015) 11 European Competition Journal 26, 27 f (containing further references).
[26] European Commission, Guidance Paper (n 23) para 39.
[27] ibid, para 23.

competition from less efficient competitors to merit intervention.[28] This means that for conditional rebates, the Commission assesses 'whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers'.[29] The pricing test inherent in the as-efficient-competitor or AEC test, together with the concept of anti-competitive foreclosure that is advanced in the Guidance Paper, has been lauded as a 'defensible standard' that allows for an assessment whether a certain behaviour is exclusionary and thus anti-competitive, or not.[30] However, introducing the AEC test as the new benchmark would, for the Court, mean raising the required standard of proof to which the Commission needs to show a rebate scheme's anti-competitiveness.[31] While the AEC test emphasises the nature of loyalty rebates as a pricing abuse, the competition issue for loyalty rebates is not only the (low and thus perhaps predatory) price but the rebates' exclusionary character.[32]

In order to carry out the AEC test, the Commission defines a 'relevant range', ie that part of demand which a purchaser could satisfy through purchases from the dominant company's competitor. Then, the Commission calculates the effective price the competitor would have to offer the purchaser in order to make up for the rebate that the purchaser looses by changing his or her purchasing behaviour.[33] Having calculated this effective price, the Commission assesses whether it is above or below the dominant company's long-run average incremental cost (LRAIC) or its average avoidable cost (AAC).[34] While an effective price above LRAIC is thought to allow an as-efficient-competitor to compete profitably, an effective price below AAC is understood to be generally able to foreclose as-efficient-competitors. An effective price between those two benchmarks needs to be assessed in-depth by the Commission.[35] Further factors may also be taken into account by the Commission, such as whether a rebate is individualised rather than

[28] ibid, para 24.
[29] ibid, para 41.
[30] Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law & Practice 2, 4.
[31] Monti (n 30) 9.
[32] Ahmet Fatih Özkan, 'The *Intel* Judgment: The Commission Threw the First Stone but the EU Courts Will Throw the Last' (2015) 11 European Competition Journal 69, 75; Whish (n 8) 2; Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, para 99.
[33] European Commission, Guidance Paper (n 23) para 41.
[34] On these cost benchmarks, see ibid, para 26.
[35] ibid, paras 43–44.

standardised.[36] Retroactive rebates – like the ones at issue in *Michelin I* – may be particularly problematic due to the probability of foreclosure effects.[37] Efficiencies will also be considered as possible justifications.[38]

As the Court has emphasised, the Guidance Paper merely sets out the European Commission's enforcement priorities as regards Article 102 TFEU, and is neither binding on national competition authorities nor on national courts or the EU Courts when applying that provision.[39] Instead, only the Commission itself remains bound by the European Courts' case law on Article 102 TFEU.[40] Therefore, it is not surprising that in one of the Commission's first cases applying the new framework, its *Intel* decision,[41] it relied both on settled case law and on its AEC test in order to make its case for the anti-competitive nature of Intel's rebate scheme. Within the Commission, some considered this case a successful marriage of established case law with an effects-based approach.[42]

C. Effects-based Analysis of Rebates in More Recent European Case Law

In a number of cases, the European Commission tested its new, more effects-based approach to the competitive assessment of rebate schemes, with varying degrees of success before the EU Courts.

1. *Loyalty Rebates in* Tomra *and* Velux

In March 2006, the European Commission adopted a decision on loyalty rebates in the case of *Tomra*, which concerned reverse vending machines.[43] At that point in time, it had already published a Discussion Paper on exclusionary conduct that preceded the Guidance Paper discussed

[36] ibid, para 45.
[37] ibid, para 40.
[38] ibid, para 46.
[39] Case C-23/14 *Post Danmark II*, ECLI:EU:C:2015:651, para 52.
[40] AG Kokott in Case C-109/10 P *Solvay v Commission*, ECLI:EU:C:2011:256, para 21.
[41] Commission Decision (COMP/C-3/37.990) *Intel* [2009] OJ C227/13.
[42] Nicholas Banasevic and Per Hellström, 'When the Chips are Down: Some Reflections on the European Commission's Intel Decision' (2010) 1 Journal of European Competition Law & Practice 301.
[43] Commission Decision (COMP/E-1/38.113) *Prokent-Tomra* [2008] OJ C219/11.

above, but not yet the Guidance Paper in its final version.[44] In its infringement decision, the Commission found that Tomra had engaged in a commercial strategy including a number of anti-competitive practices in order to maintain its dominant position on the market for reverse vending machines. In particular, it found that in several Member States, Tomra had entered into exclusivity agreements and *de facto* exclusivity agreements containing individualised quantity commitments and retroactive rebate schemes, ie rebates with an exclusivity-enhancing effect.[45] The Commission found that these constituted an abuse of a dominant position under the Court's settled case law, including cases such as *Hoffmann-La Roche*, *Portugal v Commission*, and *Michelin I*.[46] Going beyond establishing the required legal standard as set out in the case law, the Commission 'completed its analysis in this case by considering the likely effects of Tomra's practices'[47] – ie, it applied its effects-based analysis to the case, setting out how the rebate scheme at issue together with other strategies, such as the acquisition of competitors, allowed Tomra to maintain a stable market share.[48]

When Tomra appealed the Commission's decision to the General Court, the latter re-emphasised that settled case law did not require the showing of a rebate scheme's actual anti-competitive effects – the mere capability to produce such effects was sufficient.[49] The Commission's additional effects analysis was not held to be the basis for its infringement decision, and the General Court therefore considered that it did not need to review it.[50] The capability to have an anti-competitive effect was therefore confirmed as the legal benchmark by which rebates are to be assessed, while any effects-based analysis going beyond this benchmark was considered irrelevant to the outcome of the case. Overall, this was a win for the traditional assessment of loyalty rebates.[51]

[44] See European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (2005).
[45] Commission Decision (COMP/E-1/38.113) *Prokent-Tomra* [2008] OJ C219/11, paras 97, 109, 123 ff, 131 ff.
[46] ibid, paras 297 ff.
[47] ibid, para 332.
[48] ibid, paras 331–46.
[49] Case T-155/06 *Tomra v. Commission*, ECLI:EU:T:2010:370, para 289.
[50] ibid, paras 286, 290.
[51] See also Gianluca Faella, 'The Antitrust Assessment of Loyalty Discounts and Rebates' (2008) 4 Journal of Competition Law & Economics 375, 396.

Upon further appeal to the Court of Justice, the capability to restrict competition was again confirmed as the applicable legal benchmark for assessing the anti-competitiveness of rebates.[52] No particular quantitative economic test was required in order to show a rebate scheme's anti-competitiveness.[53]

Following two complaints by a competitor, the first in 2007 and the second in 2012, the European Commission investigated a rebate scheme operated by window manufacturer Velux. It found that the rebates were not loyalty-inducing or individualised, and therefore did not have foreclosure effects. As such, the Commission did not further pursue these complaints.[54] From the Commission's analysis, it can be understood that it believed that competitors with a similar cost structure would be able to compete with Velux's post-rebate prices, and the rebate scheme therefore could not have exclusionary effects.

2. *The AEC Test in* Post Danmark II *and the General Court's* Intel *Judgment*

The introduction of the AEC test by the Guidance Paper of 2009 did not only lead to a change in assessment at the European Commission, but also had repercussions on national courts that apply Article 102 TFEU, as they started to wonder whether such a test would now become part of the assessment of rebates. In the preliminary reference of *Post Danmark II* (2015), the referring court inquired about the importance of the AEC test, as outlined in the Guidance Paper, for assessing rebates under Article 102 TFEU. In its preliminary ruling, the Court of Justice replied that while this test may constitute a useful analysis within the context of Article 102 TFEU, it is merely 'one tool amongst others' and not, as such, required to meet the legal standard to prove an anti-competitive rebate under the abundant case law.[55] The Court therefore continued its rebates line of case law and refused to generally require an AEC test.[56] This was in line with the General

[52] Case C-549/10 P *Tomra v. Commission*, ECLI:EU:C:2012:221, paras 68–71.
[53] Viktoria HSE Robertson, 'Rebates Under EU Competition Law After the 2017 *Intel* Judgment: The Good, the Bad and the Ugly' (2018) 2 Market and Competition Law Review 15.
[54] Commission investigation (AT.39451) *Velux*; Commission decision of 14 June 2018 (AT.40026) *Velux*. On the first *Velux* case, see Svend Albaek and Adina Claici, 'The Velux Case – an in-Depth Look at Rebates and More' (2009/2) Competition Policy Newsletter 44.
[55] Case C-23/14 *Post Danmark II*, ECLI:EU:C:2015:651, paras 57–58, 61 (direct quote).
[56] Björn Lundqvist, '*Post Danmark II*, Now Concluded by the ECJ: Clarification of the Rebate Abuse, but How Do We Marry *Post Danmark I* with *Post Danmark II*?' (2015) 11 European Competition Journal 557.

Court's stance as expressed in its *Intel* judgment a mere year earlier,[57] which had not regarded any 'specific economic tool' as a necessary requirement for proving an anti-competitive rebate scheme, either.[58] In that judgment, the General Court also attempted to systematize the Court's case law on rebates by setting out three categories of rebates that required different degrees of attention during an antitrust assessment.[59] This was followed by the Court in *Post Danmark II*, albeit in somewhat less explicit terms, when it set out the following three categories of rebates:

The first category are pure quantity-based rebates, which are not regarded as anti-competitive if certain conditions are fulfilled; particularly, if they are not designed in a way to induce customer loyalty. The second category are loyalty rebates, which are typically seen as an abuse of a dominant position, thus amounting to somewhat of a per se prohibition – albeit with the possibility of an objective justification. The third category are rebates that require a more in-depth analysis in order to ascertain whether they are capable of restricting competition.[60] For this third type of rebate, it must be shown that the rebate is at least capable of having an anti-competitive effect. The dominant seller can objectively justify its rebate scheme by showing that any anti-competitive effects are counterbalanced or even outweighed by efficiencies.[61]

This categorisation of rebates is not uncontroversial,[62] particularly as it may lead to a quasi-per se prohibition of certain types of loyalty rebates that could be unwarranted in individual cases. In its latest case, the Court did neither confirm nor reject this three-prong categorisation.[63]

3. *The Court of Justice's* Intel *Judgment: A 'Clarified' Legal Framework*

In its *Intel* decision of 2009, the European Commission relied on the Court's settled case law on rebates as well as on AEC tests in relation to each of Intel's customers in order to find that Intel's

[57] Miroslava Marinova, 'Should the Rejection of the "As Efficient Competitor" Test in the *Intel* and *Post Danmark II* Judgments Lead to Dismissal of the Effect-based Approach?' (2016) 12 European Competition Journal 387, 392.
[58] Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-Based Approach in European Competition Law?' (2014) 5 Journal of European Competition Law & Practice 521, 523.
[59] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, paras 74–78.
[60] Case C-23/14 *Post Danmark II*, ECLI:EU:C:2015:651, paras 27–29.
[61] ibid, paras 47–49.
[62] Eg, see Damien Geradin, 'The Opinion of AG Wahl in Intel: Bringing Coherence and Wisdom into the CJEU's Pricing Abuses Case-Law' (2016) TILEC Discussion Paper 2016-034, 5; Julie Clarke, 'The Opinion of AG Wahl in the Intel Rebates Case: A Triumph of Substance over Form?' (2017) 40 World Competition 241, 255–58.
[63] Mark Friend, 'Loyalty Rebates and Abuse of Dominance Case and Comment' (2018) 77 Cambridge Law Journal 25, 27.

rebate schemes represented an abuse of a dominant position.[64] While the Commission emphasised that the Guidance Paper did not apply to the *Intel* case, as it was published after the Commission had confronted Intel with a statement of objections, it also believed its decision to be consistent with the Guidance Paper's approach.[65]

Upon appeal to the General Court, the Commission decision was upheld. On exclusivity rebates, the General Court found that these were 'by their very nature capable of restricting competition', and that therefore their actual effects did not need to be scrutinised in a lengthy test.[66] This judgment, which some criticised as being overly formalistic,[67] was further appealed to the Court of Justice. In his Opinion, Advocate General Wahl urged to Court to clarify that a rebate's capability to foreclose must go beyond the 'merely … hypothetical or theoretically possible'.[68] He also attached importance to the fact that the Commission did, at length, engage in an AEC test. As it had done so, the General Court could not simply ignore it.[69] The Advocate General's Opinion was welcomed as an important steps towards more efficiency-based arguments under EU competition law.[70]

Against this background, the Court of Justice's *Intel* judgment, rendered in September 2017, was seen as something of a litmus test for the applicability of the AEC test in the field of loyalty rebates case. In a rather brief section on the antitrust assessment of rebates, the Court set out to consolidate its earlier case law on rebates and give it a more effects-based spin without abandoning its settled views on loyalty rebates. It started out by underlining that Article 102 TFEU does not protect less efficient competitors from exiting the market.[71] But based on dominant undertakings' special responsibility to maintain competition in the market, 'Article 102 TFEU prohibits a dominant undertaking from … adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself'.[72] The Court did not refer to the

[64] Commission Decision (COMP/C-3/37.990) *Intel* [2009] OJ C227/13, paras 920 f, 923, 925, 1002–1640.
[65] ibid, para 916. The AEC analysis was carried out 'on top' of the legal test as required under the case law; see Banasevic and Hellström (n 42) 304. It remains questionable to what extent settled case law can slowly be overturned by adding non-required analyses.
[66] Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, paras 85 (direct quote), 103.
[67] Damien Geradin, 'Loyalty Rebates After Intel: Time for the European Court of Justice To Overrule Hoffman-La Roche [sic!]' (2015) 11 Journal of Competition Law & Economics 579, 580.
[68] AG Wahl in Case C-413/14 P *Intel v. Commission*, ECLI:EU:C:2016:788, para 114.
[69] AG Wahl in Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2016:788, paras 168–70.
[70] Geradin (n 62).
[71] Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, para 133.
[72] ibid, paras 135, 136 (direct quote).

three-prong categorisation of rebates that it had endorsed in *Post Danmark II*, instead focusing on loyalty rebates alone. It then 'clarified' its *Hoffmann-La Roche* case law as follows:[73] If a dominant company provides evidence that its rebates were not capable of restricting competition, the Commission needs to take into account a number of factors in order to assess whether this is so: the company's market position, the market covered by the rebates, the specific circumstances surrounding the rebates, and the presence of a strategy to exclude as-efficient-competitors.[74] The Commission can only carry out an analysis on objective justifications for a rebate scheme once it has assessed 'the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking'.[75] And, importantly: 'If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned'.[76] The Court noted that in its decision, the Commission had carried out an AEC test at length, despite holding that this was not required by under the case law. As the test represented a cornerstone of the Commission's analysis, the General Court also had to review it upon appeal.[77] It then referred the case back to the General Court to review the rebate scheme's capability to restrict competition in this light.[78] The General Court has yet to decide on that case.[79]

The *Intel* judgment was both welcomed as an important step towards a less formalistic and more effects-based approach towards rebates, and criticised for failing to provide more clarity as regards the legal test for rebates under EU competition law.[80] It attempted to find a middleway between the Court's settled case law that it has relied upon for many decades, and allowing more economics-based approaches to find their place. While no new case on rebates has reached the Court of Justice since *Intel*, the Commission has focused on loyalty rebates and other loyalty-inducing schemes in recent cases.

[73] ibid, para 138.
[74] ibid, paras 138 f.
[75] ibid, para 140.
[76] ibid, para 141.
[77] ibid, paras 142–44.
[78] ibid, paras 148–50.
[79] Case T-286/09 RENV *Intel v Commission* (case pending).
[80] Friend (n 63) 25.

4. Qualcomm*: Applying the 'Clarified' Legal Framework*

In its *Qualcomm* decision of 2018, the European Commission for the first time applied the Court of Justice's 'clarified' or consolidated legal framework for assessing loyalty rebates.[81] It emphasised that, as a matter of principle, '[e]xclusivity rebates or exclusivity payments are … presumed to constitute an abuse of a dominant position'.[82] However, a dominant player can try to rebut this presumption by showing that its rebates were not even capable of producing anti-competitive effects. For this, the Commission needs to analyse a rebate scheme's 'intrinsic capacity' to exclude an as-efficient-competitor from the market.[83] In the case at hand, the Commission concluded that Qualcomm's exclusivity rebates reduced Apple's incentives to switch to another supplier of LTE chipsets.[84] While the Commission did not carry out its own AEC test, the AEC test presented by Qualcomm relied, in the Commission's view, on a series of wrong assumptions,[85] highlighting that while useful in theory, the correct application of this economic test is far from straightforward and can be used as the battleground for a proxy fight, as a replacement for the per se abusive nature of loyalty rebates. The case is currently on appeal before the General Court.[86] It remains to be seen whether it will further clarify the place of the AEC test in EU competition law.

In a further case that is currently on appeal before the General Court, the Commission fined Google for exclusivity clauses in relation to its Google search engine.[87]

D. Exclusivity Rebates and EU Competition Law

The case law set out above shows that while the conceptual underpinnings of the AEC test may well have been accepted by the EU Courts, the European Commission's effects-driven approach

[81] Massimiliano Kadar, 'Article 102 and Exclusivity Rebates in a Post-*Intel* World: Lessons from the Qualcomm and Google Android Cases' (2019) 10 Journal of European Competition Law & Practice 439, 444 f.
[82] Commission Decision (AT.40220) *Qualcomm (Exclusivity payments)* [2018] OJ C269/25, para 382. While decided on 24 January 2018, the decision was only published on 8 June 2020.
[83] ibid, para 285.
[84] ibid,, paras 412 ff.
[85] In particular, see ibid, paras 489–95.
[86] Case T-235/18 *Qualcomm v Commission* (case pending).
[87] Commission Decision (AT.40099) *Google Android* [2019] OJ C402/19; on appeal as Case T-604/18 *Google and Alphabet v Commission* (pending).

is still held in check by its more principled approach to exclusivity rebates.[88] Also, while the Court's *Post Danmark II* and *Intel* judgments appear to approve of the use of an AEC test in order to ascertain the foreclosure effects of rebate schemes, that case law in no way requires that the Commission carry out such a test in its antitrust assessment of rebates.[89] As far as the AEC test as such is concerned, it is questionable how well this cost test can assess the anti-competitiveness of a rebate scheme under settled case law – but also beyond.[90]

The case law on rebates still requires some consolidation, and it does not appear expedient to ask the Commission to take on this job by way of setting enforcement priorities. Instead, clearer guidance is required from the Court of Justice – guidance that should be mindful of the practical applicability of the antitrust rules. While this guidance can and should rely on insights from economics, it is also true that – as then-Judge Breyer underlined in the US – '[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve'.[91] While EU competition law is still refining its approach to loyalty rebates, companies may want to rely on the Guidance Paper to put in place pro-competitive rebate schemes.[92] Nevertheless, the legal uncertainty surrounding the proper legal test applicable to loyalty rebates and the soft law nature of the Guidance Paper remain a considerable challenge.

III. REBATES UNDER US ANTITRUST LAW

§ 2 Sherman Act prohibits the monopolization of trade as well as attempted monopolization.[93] While there are no specific rules on the antitrust treatment of loyalty rebates, US antitrust rules

[88] Similarly, see Ioannis Lianos, Valentine Korah and Paolo Siciliani, *Competition Law: Analysis, Cases, & Materials* (OUP 2019) 1109.
[89] Robertson (n 53) 38.
[90] ibid 42–43 (containing further references).
[91] *Barry Wright v ITT Grinnell*, 724 F.2d 227, 234 (1st Cir 1983).
[92] Hans Zenger, 'Devising Loyalty Rebates That Comply with the As-Efficient-Competitor Test' (2013) 3 Concurrences 16, 19.
[93] 15 USC § 2.

rely on 'imperfect analogies':[94] Existing theories of harm such as exclusive dealing,[95] predatory pricing[96] or tying[97] are used in order to assess rebate schemes under § 2 Sherman Act. It is not settled, however, which of these theories of harm should prevail in the analysis of rebate schemes.[98] Where the post-rebate price is below a certain cost measure, predatory pricing may be the applicable theory of harm; where the post-rebate price is above cost but leads to anti-competitive foreclosure, the theory of harm may be more oriented towards exclusive dealing.[99] However, rebate schemes often contain combinations of elements, requiring a careful analysis of which theory of harm to apply.[100] Bundled discounts, ie 'the practice of offering discounts or rebates contingent upon a buyer's purchase of two or more different products',[101] can also be prohibited under the antitrust laws because they can lead to a tying arrangement.[102] This latter theory of harm for rebates, however, will not further be explored in this chapter as it pertains to tying rather than to loyalty-inducing rebates.[103]

The US Supreme Court has not (yet) accepted a case that would allow it to flesh out the legal test applicable to loyalty-inducing rebates. In fact, in 2013 it did not accept to hear an appeal in *Meritor*.[104] In the following, the extant case law on rebate schemes, mainly by the federal US Courts of Appeals, will be discussed with a view to distilling some general lessons from these cases.

[94] Fiona M Scott Morton and Zachary Abrahamson, 'A Unifying Analytical Framework for Loyalty Rebates' (2016) 81 Antitrust Law Journal 777, 806. Also see Sean P Gates, 'Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts' (2013) 79 Antitrust Law Journal 99, 102.
[95] Joshua D Wright, 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' (3 June 2013) <https://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf > accessed 16 June 2021.
[96] Herbert J Hovenkamp, 'Discounts and Exclusions' (2006) Utah Law Review 841; referred to as the 'Hovenkamp test' in US Department of Justice, Section 2 Report (n 4) 111.
[97] Jarod M Bona, 'Loyalty Discounts and the FTC's Lawsuit against Intel' (2010) 19 Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California 6, 10.
[98] See Damien Geradin, 'Loyalty Rebates After *Intel*: Time for the European Court of Justice To Overrule Hoffman-La Roche [sic!]' (2015) 11 Journal of Competition Law & Economics 579, 581.
[99] Similarly, see US Department of Justice, Section 2 Report (n 4) 107.
[100] Gates (n 94) 119.
[101] US Department of Justice, Section 2 Report (n 4) 91.
[102] *Smith Kline v Eli Lilly*, 575 F.2d 1056 (3rd Cir 1978); *Le Page's v 3M*, 324 F.3d 141 (3rd Cir 2003).
[103] On tying, see the corresponding chapter of this Handbook.
[104] *Eaton v ZF Meritor*, cert. denied, 133 S.Ct. 2025 (2013).

A. Low Prices as a Pro-Competitive Feature

As rebates lead to lower prices, and low prices are both beneficial to customers and can intensify competition, the predominant view under US antitrust law is that rebate schemes are not normally anti-competitive. In fact, in *Barry Wright v ITT Grinnell*, the US Court of Appeals for the First Circuit emphasised that price cuts 'are normally desirable' as long as they remain above cost and that such a price cut 'primarily injures only higher cost competitors'.[105] Early on, the idea that less efficient rivals should not be protected by the antitrust laws therefore took a hold in US antitrust law. Similarly, in the rebate case of *Virign Atlantic Airways v British Airways*, the US Court of Appeals for the Second Circuit considered that 'as long as low prices remain above predatory levels, they neither threaten competition nor give rise to an antitrust injury'.[106] This reasoning is in line with the US Supreme Court's settled case law.[107]

It has also been established that under US antitrust law, 'volume discount contracts are legal [b]ecause … they are not exclusive dealings contracts that preclude competition in violation of the Sherman Antitrust Act'.[108]

B. Single-Product Loyalty Discounts in the Department of Justice's Report

In a 2008 Report on § 2 Sherman Act, the US Department of Justice's Antitrust Division spelled out – not unlike the European Commission's Guidance Paper[109] that was drafted at about the same time – how it believed loyalty discounts should be assessed under the antitrust laws.[110] While the Report was withdrawn by the Obama administration in 2009,[111] it nevertheless allows for insights

[105] *Barry Wright v ITT Grinnell*, 724 F.2d 227, 235 (1st Cir 1983).
[106] *Virign Atlantic Airways v British Airways*, 257 F.3d 256, 269 (2nd Cir 2001).
[107] *Atlantic Richfield v USA Petroleum*, 495 US 328, 340 (1990); *Pacific Bell Telephone v Linkline Communications*, 555 US 438, 451 (2009).

[108] *W Parcel Express v United Parcel Services of America*, 190 F.3d 974, 976 (9th Cir 1999); citing *Fedway Associates v US Treasury*, 976 F.2d 1416, 1418 (DC Cir 1992).
[109] European Commission, Guidance Paper (n 23).
[110] US Department of Justice, Section 2 Report (n 4) 106–17.
[111] US Department of Justice, 'Justice Department Withdraws Report on Antitrust Monopoly Law' (11 May 2009) <https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law> accessed 23 June 2021.

into how the Department envisaged assessing loyalty-inducing rebates going forward. As it was so short-lived, however, it shall only briefly be discussed here.

The Report acknowledges that single-product loyalty discounts, ie discounts that are offered 'on all units of a single product conditioned upon the level of purchases',[112] may be anti-competitive where a company with monopoly power offers them in return for certain exclusivity or where they lead to below-cost pricing.[113] Overall, however, the Department regards both the cases litigated up until 2008 and the academic commentary on loyalty discounts to be rather favourable towards discount schemes.[114] It sets out how predatory pricing and foreclosure analysis could be applied to loyalty discounts and concludes that the Department would probably apply a predatory-pricing analysis in most cases of loyalty discounts.[115] On the analysis of foreclosure effects, the Department stresses that 'an approach requiring courts to determine whether a portion of a market is uncontestable and to quantify that portion, … would be difficult to administer'. [116] This directly relates to the European Guidance Paper, which suggests exactly this type of cumbersome analysis.

While the Report discusses the equally efficient competitor test in more general sections and considers it an apt test to assess the exclusionary nature of pricing practices,[117] the Department – unlike its European counterpart – does not regard it as appropriate for assessing loyalty discounts. Where a plaintiff wants to rely on a theory of foreclosure, the Department urges it to show 'that the discount forecloses a significant amount of the market and harms competition'.[118] Similar as in the *Qualcomm* case, the ability of a competitor to stay in the market needs to be factored in the analysis. Furthermore, the Department considers that 'a single-product loyalty discount should be illegal only when (1) it has no procompetitive benefits, or (2) if there are procompetitive benefits, the discount produces harms substantially disproportionate to those benefits'.[119]

[112] US Department of Justice, Section 2 Report (n 4) 106.
[113] ibid 106–07.
[114] ibid 110.
[115] ibid 116.
[116] ibid 117.
[117] ibid 43–45.
[118] ibid 117.
[119] ibid.

C. Rebates as Predatory Pricing or Exclusive Dealing

Loyalty rebates may be anti-competitive where they lead to below-cost pricing.[120] In order to constitute predatory pricing, a rebate scheme must lead to prices below cost in addition to a prospect that the grantor of the rebate will recoup its sacrificed profit.[121] The standard to which a predatory pricing claim based on a rebate scheme needs to be proven is the so-called *Brooke* standard, established by the US Supreme Court in 1993. There, the Court held that in order for a predatory pricing claim to succeed, the plaintiff must prove that the company holding monopoly power priced below 'an appropriate measure of … cost', and that there is a 'dangerous probability' that the predatory pricing will allow the company to recoup its losses.[122] As US antitrust law is set to protect competition rather than competitors,[123] less-efficient competitors cannot expect relief under the Sherman Act.

Exclusive dealing, as a second theory of harm, can constitute an antitrust infringement even below the threshold of predatory pricing. As it does not matter whether the exclusivity is expressly contained in an agreement or whether an agreement leads to *de facto* exclusivitiy,[124] loyalty-inducing rebate schemes can be caught under this theory of harm. Exclusive dealing is deemed anti-competitive where it leads to significant foreclose. To date, not many rebate cases have been successfully litigated on this antitrust theory of harm.

The following briefly looks at the *British Airways* case as an example of how predatory pricing could not be established for the rebate scheme at issue, and then moves towards a number of cases in which the antitrust assessment of rebates as exclusive dealing was addressed under § 2 Sherman Act, but also § 5 FTC Act.[125]

[120] *Cascade Health v Peacehealth*, 515 F.3d 883 (9th Cir 2007).
[121] *Brooke Group v Brown Williamson Tobacco*, 509 US 209 (1993).
[122] *Brooke Group v Brown Williamson Tobacco*, 509 US 209, 224 (direct quote) (1993); *Virign Atlantic Airways v British Airways*, 257 F.3d 256, 266 (2nd Cir 2001).
[123] *Brooke Group v Brown Williamson Tobacco*, 509 US 209, 224 f (1993).
[124] *ZF Meritor v Eaton*, 696 F.3d 254, 270 (3rd Cir 2012).
[125] 15 USC § 45.

1. *The US* British Airways *Case: No Predatory Pricing*

The *British Airways* case was litigated in both the EU and the US. Against the background of this case, it is no overstatement to find that EU and US approaches to loyalty rebates have opposing starting points. In the European *British Airways* case, the European Commission and the EU Courts regarded that carrier's discount scheme for travel agents as abusive because the 'performance reward schemes … were both discriminatory against some of their beneficiaries in relation to others and had as their object and effect … the reward of the loyalty of those agents to BA'.[126] In the US *British Airways* case, on the other hand, the US Court of Appeals for the Second Circuit viewed loyalty rebates as 'kinds of agreements [that] allow firms to reward their most loyal customers [which in turn] promotes competition on the merits'.[127] It also emphasised that the antitrust laws were supposed to safeguard 'competitive conduct, not individual competitors'.[128] British Airways' rebate scheme, which contained performance targets and first-dollar provisions – through which a rebate applies retroactively once the target is reached[129] – was not held to constitute an unreasonable restraint of trade (§ 1 Sherman Act), as the plaintiff had not shown that the scheme had anti-competitive effects under the rule of reason.[130] Under § 2 Sherman Act, the Court then assessed whether the rebate scheme could constitute predatory pricing. Virgin Atlantic argued that British Airways attempted to monopolize the market through predatory foreclosure and bundling of ticket sales. Relying on the *Brooke* standard set out above, the Court found that predatory pricing was not proven based on British Airways' costs and possible recoupment.[131]

2. *Assessing Exclusivity in* Concord Boat v Brunswick

In *Concord Boat v Brunswick*, the question arose under what conditions a rebate scheme could constitute anti-competitive exclusive dealing. The case was brought by a number of boat builders against Brunswick, the market leader in the manufacturing of stern drive and inboard marine

[126] Case T-219/99 *British Airways v Commission*, ECLI:EU:T:2003:343, para 299.
[127] *Virign Atlantic Airways v British Airways*, 257 F.3d 256, 265 (2nd Cir 2001).
[128] ibid 258.
[129] ibid 261.
[130] ibid 264 f.
[131] ibid 265–72.

engines for motor boats. As part of its marketing strategy, Brunswick started to offer rebates to boat builders and dealers in 1984, including market-share discounts, additional rebates for long-term market-share agreements, and volume discounts. None of the rebate programs required boat builders or dealers to buy engines from Brunswick, or not to buy from competitors.[132] In their antitrust suit, the boat builders accused Brunswick, as a dominant player, of using its discounts program to restrain trade (§ 1 Sherman Act) and monopolize the market (§ 2 Sherman Act), in addition to anti-competitive acquisitions. This, in the plaintiffs' view, allowed Brunswick to charge higher prices while at the same time excluding competitors from the market.[133] They characterised the market-share discounts as effectively imposing a 'tax' on boat builders and dealers who wanted to buy engines from Brunswick's competitors.[134] While they regarded Brunswick's various discounts as 'de facto exclusive dealing', Brunswick argued that they 'represented pro competitive business conduct'.[135]

In a jury trial, the jury found for the boat builders on all counts of the antitrust claims and awarded them damages of about US$ 133m after trebling.[136] The District Court did not grant Brunswick's renewed motion for judgment as a matter of law or its motion for a new trial.[137] The US Court of Appeals for the Eighth Circuit reversed on appeal. It held that the discount scheme employed by Brunswick may have constituted de facto exclusive dealing, but no exclusive contracts as such.[138] In some instances, purchasers were only required to obtain 80% of their requirements from Brunswick in order to qualify for the rebate – but chose to obtain 100% from Brunswick. Had Brunswick charged supra-competitive prices, the purchasers would have bought their remaining requirements elsewhere. In addition, the purchasers' reactions to changes to Brunswick's discount programs led to lower market share requiremets being imposed,[139] showing that Brunswick would not have gotten away with a truly anti-competitive rebate scheme.

Under § 1 Sherman Act, the relevant factors to assess such de facto exclusive dealing include 'the extent to which competition has been foreclosed in a substantial share of the relevant

[132] *Concord Boat v Brunswick*, 207 F.3d 1039, 1044 f (8th Cir 2000).
[133] ibid 1045 f.
[134] ibid 1046.
[135] ibid 1054.
[136] *Concord Boat v Brunswick*, 21 F. Supp. 2d 923, 925 fn 2 (ED Ark 1998).
[137] ibid 941.
[138] *Concord Boat v Brunswick*, 207 F.3d 1039, 1058 (8th Cir 2000).
[139] ibid 1056.

market, the duration of any exclusive arrangement, and the height of entry barriers'.[140] The Court found that the plaintiffs had neither shown foreclosure of a substantial share of the market, nor an exclusivity of the contracts.[141] Under § 2 Sherman Act, the plaintiffs argued that Brunswick's rebate scheme formed part of an exclusionary strategy that led to higher prices for them. The Court emphasised 'the general rule that above cost discounting is not anticompetitive'[142] and that cutting prices was 'the "very essence of competition"'.[143] Brunswick's rebate scheme was not considered to constitute a case of predatory pricing, either, as it was not shown that the discounted prices were below cost.[144]

3. *The* Intel *Case and Rebates under the FTC Act*

In parallel to the European Commission's *Intel* case, the Federal Trade Commission also brought a case on anti-competitive rebates against Intel. While in the EU, this case reached the Court of Justice and is still shaping the antitrust assessment of loyalty rebates, the US case was ultimately settled. *FTC v Intel* is notable insofar as the FTC relied not on § 2 Sherman Act but on § 5 FTC Act to make its case.[145] The FTC accused Intel of anti-competitive strategies relating to its microchips that had exclusionary effects on its competitors and impinged on consumer choice as well as on innovation. Its rebate scheme was one aspect of these anti-competitive strategies.[146] The case was settled with a consent decree in 2010. Said decree ensured, amongst others, that Intel would no longer 'condition […] benefits to computer makers in exchange for their promise to buy chips from Intel exclusively or to refuse to buy chips from others'.[147]

The FTC's *Intel* case has been accused of 'confus[ing] the landscape' of antitrust rules for loyalty rebates, as it was based on § 5 FTC Act, a provision that private plaintiffs cannot invoke.[148]

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[140] ibid 1059.
[141] ibid 1059 f.
[142] ibid 1061.
[143] ibid 1062; citing *Matsushita v Zenith Radio*, 475 US 574, 594 (1986).
[144] *Concord Boat v Brunswick*, 207 F.3d 1039, 1062 (8th Cir 2000).
[145] 15 USC § 45.
[146] FTC, *Complaint in the Matter of Intel Corporation* (16 December 2009) FTC Docket No 9431 <https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf> accessed 23 June 2021.
[147] FTC, 'FTC Settles Charges of Anticompetitive Conduct Against Intel' (4 August 2010) <https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel> accessed 21 June 2021 (direct quote); *Intel*, FTC File No. 061-0247, 9.
[148] Bona (n 97) 7.

From a comparative perspective, the case was seen as a 'fragile rapprochement'[149] of EU and US approaches to loyalty rebates that could have led to the emergence of a more harmonised approach to loyalty rebates. The settlement, however, meant that the case was not given an opportunity to establish a court precedent.

4. Meritor *and* Eisai*: Applying the Rule of Reason to Loyalty Discounts*

In *Meritor* and *Eisai*, the US Court of Appeals for the Third Circuit had to decide whether a loyalty rebate scheme could be contrary to the Sherman Act even where post-rebate prices were above cost and the predatory pricing analysis would therefore not lead to the finding of an antitrust infringement.

Meritor v Eaton was a case in the heavy-duty truck transmissions market. At issue were long-standing agreements between transmission supplier Eaton and truck manufacturers that contained target rebates. Meritor, Eaton's competitor in that market, characterised these rebates as de facto exclusive dealing arrangements.[150] Eaton granted a conditional rebate to truck manufacturers if they obtained an individualised percentage of their requirements from Eaton, ranging between 70% and 97.5%. While truck manufacturers were not required to buy from Eaton, Eaton could terminate long-term agreements if these goals were not met and it could require the manufacturer to repay any contractual savings made under the arrangement, which also included some up-front payments. Eaton's transmissions had to be listed as the 'standard offering' in the manufacturers' catalogues. Sometimes, manufacturers had to remove competitors' products from their catalogue.[151] Truck manufacturers had to grant preferential pricing to Eaton's transmissions compared to those from competitors. Agreements with manufacturers also contained an English clause, allowing truck manufacturers to buy transmissions from a competitor if the latter offered a lower price or higher quality, the truck manufacturer notified Eaton of that offer, and Eaton could not match the price or quality.[152] According to Meritor, these exclusive dealing arrangements

[149] Daniel A Crane, 'Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: A Comparative Perspective' (2016) 81 Antitrust Law Journal 209, 216.
[150] *ZF Meritor v Eaton*, 696 F.3d 254, 263 (3rd Cir 2012).
[151] ibid 265.
[152] ibid 266.

meant that it could only access 8% of the relevant market. It exited the market in 2007, just after bringing the antitrust suit.[153]

The District Court found in favour of Meritor.[154] The US Court of Appeals for the Third Circuit reviewed this judgment and highlighted that Meritor's allegations of anti-competitive conduct could only hold if Eaton could either be found anti-competitive under the price-cost test of predatory pricing (*Brooke* standard), or under the rule of reason standard that applied to exclusive dealing. For the latter, it emphasised that, based on *Tampa Electric*, 'an exclusive dealing arrangement will be unlawful only if its "probable effect" is to substantially lessen competition in the relevant market'.[155] To show this, it would be necessary to demonstrate 'significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects'.[156] In addition, the Court named further factors to be taken into consideration, namely any coercive behaviour by the monopolist, the possibility to terminate the exclusive dealing agreement, and use of this strategy by competitors.[157]

Eaton contended that Meritor's was essentially a predatory pricing claim and that the price-cost test should be applied to it.[158] The Appeals Court disagreed, finding instead that as Meritor had complained about a number of aspects in Eaton's agreements with purchasers and price was not the 'predominant mechanism of exclusion', the case needed to be assessed under the rule of reason rather than based on a price-cost test.[159] Exclusive dealing arrangements could also be unlawful where they were only partial and imposing de facto rather than express exclusivity.[160] Based on the foreclosure produced by Eaton's rebate scheme, the agreements' long-term nature, the additional anti-competitive provisions included in the agreements and an overall balancing of pro-and anti-competitive effects, the Court ruled that Eaton's rebate scheme constituted an

[153] ibid 267.
[154] *ZF Meritor v Eaton*, 769 F. Supp. 2d 684 (D Del 2011).
[155] *ZF Meritor v Eaton*, 696 F.3d 254, 268 f (3rd Cir 2012); citing *Tampa Electric v Nashville Coal*, 365 US 320, 327–29 (1961).
[156] *ZF Meritor v Eaton*, 696 F.3d 254, 271 (3rd Cir 2012; references to further cases omitted).
[157] ibid 272.
[158] ibid 273.
[159] ibid 277.
[160] ibid 282.

unlawful exclusive dealing agreement.[161] The US Supreme Court decided not to review the *Meritor* judgment.[162]

Eisai v Sanofi concerned the market for four anticoagulant drugs in which Sanofi's product Lovenox had a market share of 81.5% to 92.3% in the relevant timeframe.[163] Lovenox had an additional indication for severe heart attacks that other anticoagulants lacked. Eisai, which marketed Fragmin, one of the three other anticoagulant drugs with a market share of about 4.3% to 8.2%, complained that Sanofi engaged in a number of anti-competitive practices: In marketing Lovenox to hospitals, Sanofi offered market-share and volume discounts. Its offering also included an access clause that would limit a hospital's ability to prioritise other anticoagulant drugs in its formulary, ie the list of hospital-approved medications. Non-compliance with these terms meant that the hospitals forfeited their discount.[164]

Upon appeal, the Court of Appeals affirmed the District Court's judgment in favour of Sanofi.[165] It assessed the case under a rule of reason standard for de facto exclusive dealing, with a particular emphasis on establishing whether the arrangement led to foreclosure.[166] It found that although Sanofi's drug had an additional indication compared to the other three anticoagulant drugs, the case could not be assessed as a bundled rebate case.[167] It distinguished *Eisai* from its finding of an anti-competitive exclusive dealing arrangement in *Meritor* as here, '[u]nlike in … *ZF Meritor*, Lovenox customers had the ability to switch to competing products. They simply chose not to do so'.[168] Therefore, Sanofi's rebate scheme was not considered to constitute an anti-competitive exclusive dealing arrangement. The Court was not persuaded by Sanofi's argument that the price-cost test was the appropriate standard in this case, as the plaintiff had complained about more than just low prices.[169]

These two cases, both litigated before the US Court of Appeals for the Third Circuit within a relatively short period of time, allow us to draw a distinction between the applicability of the

[161] ibid 286–89.
[162] *Eaton v ZF Meritor*, cert. denied, 133 S.Ct. 2025 (2013).
[163] *Eisai v Sanofi-Aventis US*, 821 F.3d 394, 399 (3rd Cir 2016).
[164] ibid 400.
[165] *Eisai v Sanofi-Aventis US*, Case No 08-4168 (MLC) (DNJ, 28 March 2014); aff'd in *Eisai v Sanofi-Aventis US*, 821 F.3d 394 (3rd Cir 2016).
[166] *Eisai v Sanofi-Aventis US*, 821 F.3d 394, 402 f (3rd Cir 2016).
[167] ibid 404–07.
[168] ibid 407–08.
[169] ibid 408.

predatory pricing test and the more nuanced rule of reason standard for exclusive dealing. Despite the different outcomes in *Meritor* and *Eisai*, which can primarily be attributed to the factual evidence available to the courts,[170] these cases present important precedent as US antitrust law further develops its approach to loyalty-inducing rebate schemes. Until the US Supreme Court accepts a loyalty rebate case, they will provide valuable guidance in this area of antitrust. As was emphasised in both cases, while 'prices are unlikely to exclude equally efficient rivals unless they are below-cost, exclusive dealing arrangements can exclude equally efficient … rivals, and thereby harm competition, irrespective of below-cost pricing'.[171]

5. *Theories of Harm and Real-Life Counterfactuals in* FTC v Qualcomm

More recently, in *FTC v Qualcomm* the District Court for the Northern District of California was asked to adjudicate on the anti-competitiveness of a range of business practices in modem chip markets.[172] One of these practices included Qualcomm's agreements with Apple that meant that 'Apple received hundreds of millions in incentives from Qualcomm only if Apple purchased substantial volumes of Qualcomm modem chips'.[173] Quoting *Aerotec International*, the Court recalled that under specific circumstances, exclusivity rebates or market-share discounts can constitute de facto exclusive dealing 'because they coerce buyers into purchasing a substantial amount of their needs from the seller'.[174] A clawback provision meant that had Apple sold a single handset with a modem from a Qualcomm competitor, it would retroactively loose all its rebates, amounting to over half a million US$.[175] The Court qualified Qualcomm's agreements with Apple as de facto exclusive dealing arrangements. It held that, based on *Tampa Electric*, these infringed § 2 Sherman Act because they substantially foreclosed competition by preventing other competitors from supplying Apple, stopping competitors to enter the market, preventing Apple to initiate patent litigation, and being long-term agreements.[176] Qualcomm's exclusivity deal with

[170] Chiara Fumigalli, Massimo Motta and Claudio Calcagno, *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (CUP 2018) 199.
[171] *ZF Meritor v Eaton*, 696 F.3d 254, 281 (3rd Cir 2012); referring to *US v Dentsply International*, 399 F.3d 181, 191 (3d Cir 2005); *Eisai v Sanofi-Aventis US*, Case No 08-4168-MLC, p 55 (DNJ, 28 March 2014).
[172] *FTC v Qualcomm*, 411 F. Supp. 3d 658 (ND Cal 2019).
[173] ibid 763.
[174] ibid; referring to *Aerotec International v Honeywell International*, 836 F.3d 1171, 1182 (9th Cir 2016).
[175] *FTC v Qualcomm*, 411 F. Supp. 3d 658, 763 (ND Cal 2019).
[176] ibid 766–70.

Apple was also part of a broader strategy pursued by Qualcomm, involving this type of exclusivity agreements with purchasers.[177]

Upon appeal, the US Court of Appeals for the Ninth Circuit unanimously reversed, arguing that the District Court had gone 'beyond the scope of the Sherman Act'.[178] It found that Qualcomm's discounts did not have the 'actual or practical effect of substantially foreclosing competition in the CDMA modem chip market' because, after signing quasi-exclusive contracts with Qualcomm in 2013, Apple actually switched suppliers and no longer purchased modem chips from Qualcomm, but from Intel.[179] This real-life counterfactual, in the eyes of the Court, demonstrated that Qualcomm's discount scheme did not, in fact, have exclusionary effects. *FTC v Qualcomm* is reminiscent of the Ninth Circuit's judgment in *Allied Orthopedic*, where it had also held that exclusive dealing agreements by sensor producer Tyco, which contained volume discounts and exclusivity bonuses, were lawful because they did not coerce buyers to purchase from Tyco.[180] The FTC requested a rehearing en banc, which the Ninth Circuit denied.[181]

As we move ahead in establishing justiciable standards for loyalty-inducing rebates, it remains an open question whether the factual requirements that the Third Circuit (*Meritor*, *Eisai*) and the Ninth Circuit (*FTC v Qualcomm*, *Allied Orthopedic*) have established in order to prove the exclusivity-inducing nature of a rebate scheme can be reconciled. It will be interesting to see whether the Department of Justice's antitrust suit against Google,[182] involving the same exclusivity clauses that are currently before the General Court in Europe, will be able to shed more light on such exclusivity-enhancing commercial strategies by dominant players.

D. Loyalty Rebates and US Antitrust Law

Under US antitrust law, a loyalty rebate scheme may be assessed either under a theory of predatory pricing or as an exclusive dealing arrangement.[183] Despite discounts and rebate schemes representing ever-present business practices, 'the antitrust law governing these discounts is

[177] ibid 770–72.
[178] *FTC v Qualcomm*, No 5:17-cv-00220-LHK, p 9 (9th Cir, 11 August 2020).
[179] ibid 54.
[180] *Allied Orthopedic Appliances v Tyco Health Care Group*, 592 F.3d 991, 996 ff (9th Cir 2010).
[181] *FTC v Qualcomm*, No 5:17-cv-00220-LHK, p 54 (9th Cir, 28 October 2020).
[182] *US v Google*, No 1:20-cv-03010-APM (DDC, complaint filed 20 October 2020).
[183] Blair and Knight (n 2) 131.

unclear, confusing, and constantly changing'.[184] In fact, the precise legal standard under either theory of harm is still being developed by the courts and has yet to reach the Supreme Court. Where the non-price nature of a loyalty rebate scheme is at the centre of a commercial strategy and thus of a complaint, there will be parallels drawn to exclusivity schemes that do not necessarily involve traditional rebate schemes. Here, some development is to be expected in high-profile cases such as the *Google* complaint before the US District Court for the District of Columbia, which can be seen as the US version of the European Commission's *Google Android* case which is now before the General Court. Here, future developments may also have important repercussions on the antitrust rules for loyalty rebates. Until such rules become more settled, companies wishing to minimize their antitrust exposure may wish to opt for rebate schemes that the purchaser can readily terminate, prefer short-time over long-time rebate schemes,[185] and avoid 'first dollar' retroactive schemes.

IV. THE ANTITRUST ASSESSMENT OF REBATES – AN OUTLOOK

Depending on the angle that one takes, rebates can be seen as a discriminatory practice where they are granted to some purchasers but not to others, as an exclusive dealing arrangement where they require a purchaser to obtain (nearly) all of its requirements from a dominant supplier, as a predatory pricing practice where they lead to below-cost prices (and recoupment), or as a tying practice where bundled rebates are at issue. The present chapter dealt with the first three theories of harm as they apply to single-product loyalty rebates in both the EU and the US.

From a comparative perspective, 'the degree of divergence between the assessment of rebates under section 2 of the Sherman Act and Article 102 of the Treaty could hardly be larger'.[186] Cases litigated on both sides of the Atlantic – such as *British Airways*, *Intel* or most recently *Qualcomm* – highlight these diverging approaches to loyalty rebates in the EU and the US.[187] EU theories of harm primarily relate to discrimination and probable exclusionary effects brought about

[184] Bona (n 97) 6.
[185] ibid 19.
[186] Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8 Journal of Competition Law & Economics 717, 718 f. Also identifying loyalty rebates and predatory pricing as areas of significant divergence, see Brian A Facey and Dany H Assaf, 'Monopolization and Abuse of Dominace in Canada, the United States, and the European Union: A Survey' (2002) 70 Antitrust Law Journal 513, 549–55.
[187] Zenger (n 186) 719.

by loyalty-inducing rebates, US theories of harm mainly rely on qualified exclusionary effects brought about by predation or exclusive dealing. The US approach has been praised as 'more pragmatic',[188] the EU approach has sometimes been critiziced as overly formalistic. As Daniel Crane observed, 'European law is more likely to draw on formal rules to prohibit loyalty rebates, U.S. law is more likely to draw on formal rules to permit them. Europe employs legal formalism, and the United States uses economic formalism'.[189] In essence, both approaches are still developing and this development can be observed in identical cases that are being simultaneously dealt with in both jurisdictions. Most recently, the *Google Android* case may provide a further impetus to clarify the antitrust assessment of exclusivity agreements, which can also be useful for an assessment of loyalty-inducing rebates.

Both the European Commission and the US Department of Justice have actively engaged in devising more effects-based but also workable rules for assessing loyalty rebates. To date, courts on both sides of the Atlantic have struggled to come up with a workable, sustainable legal benchmark for loyalty rebates. New cases are continuously adding to this endeavour. In this development, some degree of convergence can be seen on both sides: The EU is introducing more effects-based elements into its rule-based approach to loyalty rebates, and different theories of harm continue to be tested in the US in order to carve out the applicable legal standard for loyalty rebates. Against the different ideological underpinnings of EU competition and US law, it is not surprising that considerable challenges will remain in harmonising the antitrust assessment of rebates,[190] an endeavour that parties subject to antitrust exposure in both jurisdictions will certainly welcome. By tracing both the EU and US approaches to loyalty rebates, this chapter exposed some major differences in the general approach to rebates, which is much more sceptical in the EU, while in the US the pro-competitive view of rebates largely prevails. Nevertheless, it is striking how emerging voices from the US are moving towards a recognition of the exclusionary effects that de facto exclusivity rebates can adduce. At this point, however, both the US Supreme Court and the European Court of Justice will need to weigh in on the future of the antitrust assessment of loyalty-inducing rebates.

[188] Ahlborn and Bailey (n 2) 119.
[189] Crane (n 149) 210.
[190] ibid 220.