

The *Intel* Case: Between *Tomra Systems ASA*, the *Commission's Guidance on Enforcement Priorities*, and the Alleged Infringement of Procedural Requirements - No Fat Left on the Bone

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Introduction

This paper will analyse the European Commission's (the "Commission") approach to loyalty rebates in the *Intel* Decision. The analysis will follow the main structure of the action brought by *Intel* against the Commission¹ and argue that there does not seem to be any fat left on the bone. Indeed, if, on the one hand, *Intel* maintains that the Commission has followed a *per se*² approach towards its rebate schemes, then, on the other hand, it must be pointed out that the Commission's decision, after taking into consideration the relevant case law of the European Court of Justice ("ECJ") in the field of Art. 102 TFEU, carries on the "as efficient competitor test", thereby proving how the alleged conditional rebates under scrutiny cannot fall within the concept of "competition on the merits" as they were capable of hampering competition from competitors which were considered to be as efficient as the dominant undertaking.³ In a certain way, the Commission's approach in dealing with the case can be seen as a shrewd attempt to win the case before the European Courts without, however, eluding an effects-based analysis in accordance with its *Guidance on Enforcement Priorities* ("*the Guidance*").

To put it differently, what the Commission does is to demonstrate that the law of Art. 102 TFEU is still the ECJ case law, according to which loyalty rebates are treated in a rather formalistic way.⁴ In addition, the Commission shows that, even though a formalistic approach is not desirable from an economic point of view, the practices at issue are caught by the effects-based approach enshrined in the *Guidance*. In other words: should the European Courts switch to a full economic approach, *Intel's* behaviour would in any case be caught by Art. 102 TFEU.

The orthodoxy of such a method might be disputable. However, one can also argue that, as the Commission decided to opt for an effects-based approach towards Art. 102 TFEU⁵ and as it cannot state what the law of the abuse of dominant position is, it cannot be expected that the Commission not take into account the case law of the ECJ. Indeed, the *Guidance* is nothing more than a soft-law document setting out enforcement priorities. Yet,

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¹ Case T-286/09, *Intel v. Commission*, Action brought on July 22nd, 2009;

² *Intel* has explicitly referred to a *per se* approach in its plea. This suggests that, according to the dominant firm's view, the Commission has used a rigid approach. It can also be argued that *Intel*, by mentioning the expression "*per se*", means a much more rigid approach than the formalistic one that has been adopted by the European Courts so far.

³ *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ, 2009/ C 45/02, par. 24.

⁴ The way the European Courts have always treated conditional rebates is far from being considered as effects-based. That being said, it is clear that the Courts have had a formalistic approach towards loyalty rebates so far. This does not mean that a fully-fledged *per se* approach has been used though. Indeed, what has been applied so far is, arguably, a "reasoned legal test" which, however, does not seem desirable on economic grounds.

⁵ See, *inter alia*, R. Whish and D. Bailey, *Competition Law*, (OUP, 2012).

as the *Intel* decision demonstrates, the fact that the relevant case law is addressed does not prejudice that an economic approach is pursued. Nonetheless, the issue here is that *Intel* maintains that a *pure* formalistic approach has been used in the decision under review.

First, this paper will address the issue of whether there should be or is a formalistic rule regarding the abuse of dominant position, especially in the field of conditional rebates. Indeed, it is argued that such an approach is not desirable in this area of law as it might in itself cause anticompetitive effects; this is why the *Commission's Guidance* appears to be the correct response to the formalism that has been introduced by the case law.⁶ Moreover, if it is true that the outcome of *Tomra's* judgment is ambiguous, as it might represent a step backward towards a by-object approach in the field of loyalty rebates, it is also argued that, nonetheless, it is in line with the well-known tension between the Commission and the Courts' view on what the law of abuse of dominance should be. In fact, as can be seen from the judgment itself, the Court accepted the Commission's findings that the practices at issue were capable⁷ of having anti-competitive effects. Indeed, even if the *Guidance* was not *ratione temporis* applicable when the *Intel* decision was adopted, it is made clear that, in order to assess whether a rebate is capable of anti-competitive foreclosure, the dominant firm's prices, rebates, and costs must be thoroughly investigated. Indeed, this is what was done in *Intel*.

After reviewing the relevant legal pleas that were raised by the dominant firm before the General Court, this paper argues that it would be much easier for *Intel* to succeed on procedural rather than substantive grounds. Indeed, it is arguable that the Commission did not have either a *per se* or formalistic approach in dealing with *Intel's* alleged anti-competitive practices. According to the ECJ's settled case law and the *Guidance*, the Commission is not required to show that the alleged infringement has an "actual and concrete" impact on competition; rather, it must demonstrate that the contested practices are "likely or capable" of having an anti-competitive effect. Moreover, it appears arguable that the conditionality of the rebates at issue was well demonstrated and that the "as efficient competitor test" was correctly applied.

In addition, the fact that the dominant firm's competitor substantially increased its market share and profitability and the alleged failure to establish a causal link between the conditional discounts and the decisions of customers not to purchase from a competitor are immaterial. The Commission is not required to prove that there has been an "actual" impact on consumers. However, it is this paper's contention that, if there is any, *Intel's* only possibility for success lies in the alleged infringement of procedural requirements during the administrative procedure; specifically, the decision not to grant an oral hearing in relation to

⁶ See M. Kellerbauer, "The Commission's new enforcement priorities in applying Article 82 EC to Dominant Companies' Exclusionary conduct: a shift towards a more economic approach?", ECLR, 2010; For a different view on the point, see L.L. Gormsen, "Why the European Commission's enforcement priorities on article 82 EC should be withdrawn" (2010) 31 (2) ECLR 45;

⁷ It seems important to emphasise that the Commission seems to use the expressions "being capable" and "it is likely" as synonymous. Semantically speaking, however, there is a huge difference between the two. An anticompetitive conduct that is "capable" of causing anticompetitive effects is not necessarily "likely" to cause them. Thus, there seem to be also a huge difference in economic terms. As an outstanding scholar brilliantly pointed out in a conference, this could be better understood with a simple example. If someone is told that the plane he or she is going to fly with is "capable" of crashing, it will probably be the case that he or she will still take it. However, if the he or she is told that the plane is "likely" to crash, he or she is probably not going to get on the aircraft.

the supplementary statement of objections and letter of facts and the failure to make a proper note of the meeting with a key witness from one of the customers. However, it is arguable that *Intel* will find it difficult to succeed on these grounds as well.

(A). Facts

Although it is not within the scope of this paper to thoroughly analyse the facts of the *Intel* case, it is worth providing a brief summary. In fact, it is arguable that *Intel* brilliantly represents the first genuine attempt by the Commission to apply the new rebates analysis enshrined in the *Guidance*.⁸ The case concerned the supply of central processing units (“processors”) to original equipment manufacturers, that is to say to buyers or customers (hereafter “the buyers” or “the customers”). *AMD*, the complainant, is also *Intel*’s main competitor. The Commission discovered that *Intel* had abused its dominant position by giving rebates to its customers (*Dell*, *Lenovo*, *HP*, and *NEC*) that were conditional on sourcing all or almost all of their inputs from *Intel*. The case also concerned direct payments to one of the major retailers (*MSH*) which were conditional on only stocking PCs using *Intel*’s processors. However, it must be emphasised that, for the purpose of this article, which is focused on conditional rebates, the so-called naked restrictions that *Intel* practised towards *MSH* are not addressed.

(B) Substantive Grounds

a. The “*Tomra System ASA* saga”

Although it is not within the scope of this paper to thoroughly analyse the *Tomra System ASA* (“*Tomra*”) judgment⁹, it is worth exploring both the legal reasoning and outcome of that case in order to emphasise the tension between the European Courts’ formalistic approach and the *Guidance*’s effects-based approach when dealing with loyalty rebates. With regards to the facts of the case, it is sufficient to note that *Tomra* produced automatic recovery machines for empty beverage containers that reimbursed the amount of the deposit to the customer. After receiving a complaint from a competitor, the Commission opened an investigation against the dominant firm and adopted the then contested decision stating that *Tomra* implemented an exclusionary strategy in the relevant product market¹⁰ “involving exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes”.¹¹

In the decision, the Commission stated that *Tomra* used a “strategy having an anticompetitive object or effect, both in their practices and in internal discussions within the group”¹² and that all the contested behaviours were part of the dominant firm’s “general

⁸ Indeed, it must be recalled once more that the *Guidance* was not *ratione temporis* applicable to this case.

⁹ Case T-155/06, *Tomra Systems ASA v Commission*, [2010] ECR II 000; See also Case C-549/10 *Tomra Systems ASA v Commission*, nyr. As regards the literature, see A. de Crayencour and J. Temple Lang, “*Tomra: The Assessment of Retroactive Rebates by the Court of Justice after the Guidance Paper*”, JECLP, 2012. See also G. Federico, “*Tomra v Commission of the European Communities: reversing progress on rebates?*”, ECLR (2011).

¹⁰ Especially in Germany, the Netherlands, Austria, Sweden, and Norway.

¹¹ Case T-155/06, *Tomra Systems ASA v Commission*, par. 7.

¹² *Ibid.*, par 11.

policy directed at preventing market entry, market access and growth opportunities for existing and potential competitors and, ultimately, at driving them out of the market so as to create a situation of virtual monopoly".¹³ Indeed, regarding the discounts, the Commission pointed out that "discounts granted for individualised quantities corresponding to the entire or almost entire demand have the same effect as explicit exclusivity clauses, in that they induce the customer to purchase all or virtually all its requirements from a dominant undertaking. The same is true of loyalty rebates, in other words rebates that are conditional on customers purchasing all or most of their requirements from a dominant supplier".¹⁴ Further, regarding the rebates, the Commission made it clear that the schemes were individual and that the thresholds to be met were linked to the total requirements of each buyer or a large part of it; moreover, the discounts were established on the basis of each customer's estimated requirements or purchasing volumes already achieved in the past. In fact, the Commission emphasised that, under a retroactive scheme, a buyer has a strong incentive to reach the thresholds.¹⁵ In conclusion, the Commission stated that, according to the case law of the ECJ, it would be sufficient to show that the allegedly abusive behaviour tended to restrict competition.¹⁶

One can therefore argue that the Commission, in order to follow a strategic approach aimed at winning the case before the Courts, began by addressing the law of Art. 102 TFEU in the field of loyalty rebates, that is to say the relevant ECJ case law. Indeed, although it can be argued that there is an on-going trend towards an increasingly economic approach¹⁷, the Courts still consider loyalty rebates as a formalistic abuse. Nonetheless, the Commission continued to analyse the likely effects of the allegedly abusive practice without going into as deep of an economic analysis as was made in *Intel*. Indeed, before the GC, *Tomra* argued, *inter alia*, that the Commission did not prove that a strategy to foreclose competition was designed, that it did not assess that the agreements under scrutiny were capable of or in fact foreclosed competition, and that it considered the individualised retroactive rebates unlawful *per se*.

Unsurprisingly, the GC made it clear that the concept of abuse is an objective concept referring to the behaviour of an undertaking in a dominant position which is able to influence the structure of the market "where, as the result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".¹⁸ Indeed, the GC followed the Commission's reasoning and found that the dominant firms' practices were liable to foreclose competition.¹⁹

With regards to the allegedly incorrect and misleading evidence and the assumptions used as the basis for the assessment of the capability of the retroactive rebates

¹³ *Ibid.*, par 12.

¹⁴ *Ibid.*, par 14.

¹⁵ *Ibid.*, par 15.

¹⁶ *Ibid.*, par 16.

¹⁷ See note 5 above, page 201.

¹⁸ See note 9 above, par 38; See also Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, par. 91 and Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, par 549.

¹⁹ See note 9 above, par. 39.

to foreclose competition²⁰, the GC stated that, because the rebates schemes were individual and that the thresholds were established on the basis of the buyer's estimated requirements or past purchasing volumes, they represented a strong incentive for buying all or the majority of the equipment needed from the dominant firm, thereby artificially raising the cost of switching to any potential competitor. Moreover, the GC considered that the Commission did not state that the rebate schemes automatically entailed negative prices nor did it state that this is a condition to find rebates schemes abusive. Additionally, the GC made it clear that the fact that certain diagrams illustrating the economic effects of the schemes contained errors cannot, on its own, undermine the conclusions relating to the anticompetitive nature of the rebate.

Regarding the actual effects of the rebates, the GC stressed that, according to settled case law, "*where some grounds of a decision on their own provide a sufficient legal basis for the decision, any errors in other grounds of the decision have no effect on its enacting terms*"²¹ and that, as the Commission rightly pointed out, it is sufficient, for the purpose of establishing and infringement of Art. 102 TFEU, to show that the practices at issue tend to restrict competition or that the conduct under scrutiny is "capable" of having that effect. Nonetheless, as the GC pointed out, the Commission went beyond what the law normally requires, that is to say that it considered the likely effects of the applicants' behaviour.²²

Furthermore, the AG²³ stressed that the notion of abuse is an objective concept²⁴ and that the Commission did not make reference to "intent" as a necessary element to the establishment of an infringement of Art. 102 TFEU. Indeed, regarding the alleged procedural error and error of law in the examination of retroactive rebates, the AG noted that²⁵ in *Teliasonera*²⁶ the Court held that the effect does not necessarily need to be concrete but that it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking. Moreover, in *Deutsche Telekom*²⁷, the Court stated that where a dominant firm implements a pricing practice, such as the one at issue in that case, with the purpose of driving as efficient competitors out of the market, the fact that the desired result is not ultimately achieved does not exclude its categorisation as abuse. Unsurprisingly, the AG added then that the cost-price comparison is not required by the case law.²⁸ It followed that, also unsurprisingly, the ECJ restated that the concept of abuse is an objective one and that the existence of an anticompetitive intent is just one of the many different facts that may be taken into account and which does not need to be proved.²⁹

In addition, with regard to the retroactive rebates³⁰, *Tomra* argued that the Commission should have undertaken a deep analysis of the costs in order to establish the

²⁰ *Ibid.*, paras. 258-272

²¹ *Ibid.*, par. 286

²² *Ibid.*, paras. 285-290

²³ See AG Mazák's Opinion to Case C-549/10 P, *Tomra Systems ASA*.

²⁴ *Ibid.*, par 8.

²⁵ *Ibid.*, par. 45.

²⁶ See Case C-52/09, *Teliasonera* [2011] ECR I-527, par. 64;

²⁷ See Case C-280/08 P, *Deutsche Telekom* [2010] ECR I-9555, par 254.

²⁸ See note 20 above, par. 51.

²⁹ Case C-549/10 *Tomra Systems ASA v Commission.*, par 20-21.

³⁰ *Ibid.*, par 59.

level under which the prices charged can have exclusionary effects, that the GC failed to examine the arguments based on the relationship between the prices and the costs of the dominant firm's group, and that it did not require the Commission to take account of that.³¹ The ECJ pointed out that the GC was correct to observe that for the purposes of proving an abuse of a dominant position, it is sufficient to show that that conduct tends to restrict competition or that it is capable of such an effect.³²

Subsequently, the ECJ proceeded to invoke the relevant case law by making it clear that in order to assess the conditionality on the customer's obtaining all or most of its requirements from the dominant firm, it is necessary to consider all the circumstances of the case and to determine whether the rebates tend to remove or restrict the buyer's freedom.³³ Therefore, the issue appears to be whether the rebate in question tends to prevent customers from sourcing from other producers.³⁴ Indeed, the incentive to obtain supplies exclusively or almost exclusively from *Tomra* was strong because the thresholds were combined with a retroactive system and an individualised scheme. In addition, it is important to emphasise that the discounts were applied to some of the largest customers of the group. It followed that it was deemed unnecessary to analyse the actual effects of the rebates on competition given that the purpose in itself was capable of having an effect on competition.

One can therefore argue that the *Tomra* judgment cannot be viewed as a step towards a more economic approach in the field of exclusionary abuses, especially with regard to conditional rebates. The words used by the Courts do not appear to be filled with economic analysis. However, although a formalistic approach is not desirable and, indeed, there is a trend towards an increasingly effects-based approach, the legal reasoning and the outcome of the abovementioned judgment should not come as a surprise. In fact, even though it might represent a step backward to a rather formalistic test, it must be recalled that the law of Art. 102 TFEU is still based on a mostly formalistic test. The Commission itself, which switched towards a more effects-based approach with the adoption of its *Guidance*, states in *Intel* that that is not applicable *ratione temporis* to the case. Nonetheless, as it will be shown below, it undertakes a thorough analysis of the costs in order to show the Courts how the dominant firm's behaviour at issue should be caught by Art. 102 TFEU.

b. Is formalism desirable in the field of loyalty rebates?

The purpose of this paper is not to engage in a debate about the purpose of Art. 102 TFEU as the literature has abundantly focused on that point.³⁵ However, with regards to the

³¹ *Ibid.*, paras 50-53.

³² *Ibid.*, 68.

³³ *Ibid.*, par 71.

³⁴ *Ibid.*, par 72.

³⁵ See, *inter alia*, R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, (OUP, 2011); C. Ahlborn and J. Padilla, "From Fairness to Welfare: Implications for the Assessment of Unilateral conduct under EC Competition Law", in *European Competition Law Annual 2007: A Reformed Approach to article 82 EC* (Hart Publishing, 2008); See also P. Akman, "Searching for the Long-Lost Soul of Article 82 EC" (2009) 20 (2) OJLS 267; See also R. O'Donoghue, J. Padilla, "The Law and Economics of Article 102 TFEU", (Hart Publishing, 2013); See also F. Etro and I. Kokkoris (eds), *Competition Law and the Enforcement of Article 102*, (OUP, 2010); G. Monti, "Article 82 EC: What Future for the Effects-Based Approach?", *JECLP*, 2010 (1) 1; See

issue of formalistic rules when assessing an abuse of dominant position, it is arguable that such an approach is not economically desirable for several reasons: the need to avoid false positives, the fact that Art. 102 TFEU should not be concerned with the protection of competitors as such but should aim at protecting consumer welfare and competition in itself, and the fact that dominant firms must be able to compete on the merits³⁶ as they do bear a special responsibility.³⁷ Indeed, as can be seen from the pleas in law that have been raised before the GC³⁸, one of the most common arguments is that the Commission, together with the European Courts, apply Art. 102 TFEU in a strict and formalistic way. Moreover, *Intel* contended that the Commission erred in law by finding that the conditional discounts granted were abusive *per se* by virtue of being conditional without establishing that they had an “actual capability” to foreclose competition.³⁹

According to the *Guidance*, conditional discounts aim at rewarding customers for a particular form of purchasing behaviour, usually if the purchases over a precise period exceed a given threshold.⁴⁰ Indeed, as it is well-known, there can be two categories of conditional rebates: those granted on all purchases, such as retroactive rebates, and those granted on the purchases made in excess of the established threshold, such as incremental rebates.⁴¹ The point is that the Commission itself stresses that the determination must be whether the schemes at issue are “liable to result in an anti-competitive foreclosure”.⁴² In other words, the Commission must look at 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”.⁴³

This is the reason why, according to the effects-based approach enshrined in the *Guidance*, the Commission is required to analyse at what price a competitor would have to offer the same product in order to compensate the loss of the rebate if the buyer switched the relevant range away from the dominant firm. In other words, the price that must be taken into consideration is the list price minus the rebate likely to be lost, calculated over the relevant range of sales and over the relevant period of time. The lower the estimated effective price is compared to the average price of the dominant supplier, the stronger the loyalty effect. Where the price at issue is below the AACs, the rebate scheme is capable of

also the rather critical position of L. L. Gormsen, “Are Anticompetitive Effects Necessary for an Analysis under Article 102 TFEU?”, *World, Comp.* 36, no. 2 (2013): 223-246.

³⁶ The ECJ case law refers to the concept of “competition on the merits”. See Case C-280/08, *Deutsche Telekom* [2010] ECR I-9555, par. 91; See also Case T-201/04, *Microsoft Corp v Commission* [2007] ECR II-3601, par. 1070. See also Case C-52/09, *Teliasonera*, [2011] ECR I-000; Case T-321/05, *Astra Zeneca v Commission* [2010] II- ECR 000; See also Case T-155/06, *Tomra Systems ASA v Commission*;

³⁷ See, *inter alia*, Case 322/81, *Michelin v Commission*, [1983] ECR 3461; Case C-52/09 *Teliasonera*, [2011] ECR I-000, par. 24.

³⁸ See note 1 above.

³⁹ *Ibid.* In the literature, see D. Gerardin, “The Decision of the Commission of 13 May 2009 in the Intel case: where is the foreclosure and consumer harm?” *JELCP* (2010) arguing in favour of *Intel*. However, it must be pointed out that, as has been stated elsewhere, his view might be biased. See also the opposite view of N. Banasevic and P. Hellstrom, “When the chips are down: some reflections on the European Commission’s Intel Decision”, *JELCP* (2010). See also, I. N. Osorio, “A Test to Ban rebates: Which test is Applicable to rebates under TFEU Art. 102?”, *ECLR*, 2012; See also B. Batchelor, “Rebates in a State of Velux: Filling in the Gaps in the Article 102 TFEU Enforcement Guidelines”, *ECLR*, 2011; L. Kjolbye, “Rebates under article 82 EC: navigating uncertain waters”, *ECLR*, 2010.

⁴⁰ *Guidance on Enforcement Priorities*, par. 37.

⁴¹ *Ibid.*, paras 37-45

⁴² *Ibid.*, par 38

⁴³ *Ibid.*, par 41

foreclosing equally efficient competitors. Where the effective price is between AACs and LRAICs, the Commission will have to consider other factors in order to be able to assess the effects⁴⁴, whilst where the price remains consistently above the LRAICs, there is a rebuttable presumption that an equally efficient competitor would be able to compete.⁴⁵

The *Guidance* clearly illustrates that the Commission's approach towards conditional rebates cannot be considered as formalistic. Indeed, setting out predictable and administrable rules which ensure legal certainty should not be confused with formalism or *per se* rules. In fact, as the Commission pointed out in the decision at issue, normally, an intervention under Art. 102 TFEU is required when the allegedly abusive conduct is "likely"⁴⁶ to lead to anti-competitive foreclosure⁴⁷. In any case, the assessment will be made through the use of counterfactuals. However, the Commission makes it clear that neither the case law nor the *Guidance* requires the demonstration of "actual" foreclosure on the market.⁴⁸

In other words, in the decision, the Commission seems to suggest that, whilst the European Courts have always tended towards a formalistic approach⁴⁹, meaning they never require proof of actual effects of the alleged abusive conduct, the *Guidance* states that the conduct at issue must be "capable" of anti-competitive effects. To put it differently, the Commission appears to argue that if *Intel* continues to contend that what must be demonstrated are the real effects of the alleged anti-competitive effects, there will be no possibility for success before the Courts for two reasons: firstly, the latter have always adopted a formalistic approach; secondly, should the Courts switch to an effects-based approach, they would follow the *Guidance* according to which, as has been stated above, the behaviour in question must be "likely or just capable" of having anticompetitive effects.

Indeed, as the Commission will intervene in those cases where the dominant firm's behaviour is "likely or just capable" of causing foreclosure in the market, it will be unlikely for *Intel* not to have its plea dismissed as the capability of anti-competitive effects on the market and the conditionality of the schemes have been demonstrated by the Commission. In fact, as it has been stated above, although the current state of the law does not require the demonstration of the effects of the practices at issue, the Commission has carried out a deep analysis of *Intel's* rebates showing that the conditional rebate schemes prevented or made it much more difficult for each customer to source from *Intel's* competitor.⁵⁰

With *Dell*, for instance, the Commission made it clear that *Intel* conditional rebates constituted a vital element for its decision to source exclusively from the dominant firm.⁵¹ In fact, as *Dell* was 100% *Intel*-exclusive during the relevant period, it was considering switching a share of its purchases to *AMD*, *Intel's* competitor.⁵² The point was that, even if *AMD's* processors were perceived as increasingly of interest, what was clear was that *Intel*

⁴⁴ *Ibid.*, par.44

⁴⁵ *Ibid.*, par. 43.

⁴⁶ *Ibid.*, par 20.

⁴⁷ *Commission Decision relating to a proceeding under Article 82 of the EC Treaty and article 54 of the EEA Agreement*, COMP/C-3/37.990-*Intel.*, par. 1224.

⁴⁸ *Ibid.*, paras 919-921, 923.

⁴⁹ See, for instance, Case T-203/01, *Michelin v Commission*, ECR II-4071, paras 56, 65, 100. It is interesting to mention that the GC has repeatedly stated that the anticompetitive effects can be inferred and therefore do not need to be proved. See, Case T-57/01, *Solvay c. Commission*, [2009] ECR II-4261; See also case T-66/01, *ICI v Commission*, [2010] ECR II-000 and, Case T-155/06, *Tomra Systema ASA*.

⁵⁰ See note 47 above, par. 926.

⁵¹ *Ibid.*, par. 930.

⁵² *Ibid.*, par. 931.

rebates would have offset any potential advantage of switching to *AMD*.⁵³ Indeed, *Dell's* company statement points out that an analysis of the pros and cons of adopting a dual source strategy was carried out due to the fact that there would have been a potential loss of *Intel* rebates which restricted *Dell's* freedom to choose⁵⁴.

In other words, what emerged was that if *Dell* were to cease being *Intel* exclusive, it would have not received a significant amount of the rebates. The Commission stated that this is the way “conditionality” works, as it was clear the rebates would not have been awarded, or would have been awarded in a different manner, had *Dell* decided not to purchase all the processors from the dominant firm.⁵⁵ The anti-competitive effects of the rebates schemes were also demonstrated by the fact that the lack of transparent and objective criteria used by *Intel* to determine the precise amount of the discounts which would have been lost if exclusivity had been breached played an important role in further limiting *Dell's* freedom of choice.⁵⁶ It is also worth mentioning that the Commission, after restating that the rebates in question are to be considered as fidelity rebates under the conditions of the ECJ case law, added that they also had the effect of restricting *Dell's* freedom over the period at issue.⁵⁷

For *HP*, one of the other *Intel* customers, the rebates were conditional upon *HP* sourcing at least 95% of corporate desktop processors from *Intel* over the relevant period. As the customer in question explained, *Intel* rebates constituted a material factor in its final decision to agree with the discounts schemes and, therefore, to scale down the original plans for the deployment of *AMD* based products.⁵⁸ In fact, it emerged that *HP* had asked *AMD* for a counteroffer which would have compensated for the loss of *Intel* rebates.⁵⁹ However, *AMD* made it clear that it could have never offered a compensating rebate of such a size. Its only option was to provide *HP* with a certain amount of processors for free. However, *HP* wound up accepting only a reduced amount of them in order not to lose *Intel* discounts.⁶⁰ In conclusion, after noting that the discounts at issue should be considered as fidelity rebates within the meaning of the case law, the Commission added that, in light of the considerations made, they also had the effect of restricting *HP's* freedom of choice⁶¹.

With *NEC*, the Commission found that *Intel* made the payment of rebates conditional upon purchasing at least 80% of its needed inputs from *Intel* and were *de facto* conditional on *NEC* obtaining the vast majority of its requirements from the dominant firm.⁶² Indeed, empirical evidence shows that prior to the agreement, the customer at issue increased its purchases from *AMD*, whilst the grant of the discounts materially influenced it to switch to *Intel*. In fact, it emerged that the agreement between *Intel* and *NEC* had the effect of reversing the latter's strategy. Further evidence is the fact that the agreed target was reached within a short period of time.⁶³ For these reasons the Commission concluded

⁵³ *Ibid.*, par. 932.

⁵⁴ *Ibid.*, par 933.

⁵⁵ *Ibid.*, par. 941.

⁵⁶ *Ibid.*, par. 942. Indeed, it is fleshed out that intransparency reinforces conditionality.

⁵⁷ *Ibid.*, par. 950.

⁵⁸ *Ibid.*, par. 954.

⁵⁹ *Ibid.*, par. 956.

⁶⁰ *Ibid.*, par. 957.

⁶¹ *Ibid.*, par. 972.

⁶² *Ibid.*, par. 973.

⁶³ *Ibid.*, par. 979.

that the rebates in question were *de facto* conditional on *NEC* sourcing almost all of its inputs from *Intel*. Furthermore, as in the abovementioned cases, after restating the relevant case law, the Commission stated that those practices also had the effect of limiting *NEC* freedom of choice and prevented other competitors from supplying *NEC*.⁶⁴

With *Lenovo*, it must be said that it concluded a Memorandum of Understanding setting out incremental payments schemes.⁶⁵ The unwritten condition was that *Lenovo* had to cancel its *AMD* projects entirely. The reasons for *Lenovo*'s desire to switch to *AMD* were the non-dominant firm's competitiveness and the growing demand for *AMD*-based notebooks as well as the fact that a dual source strategy would have entailed more advantageous business relationships with both the dominant undertaking and its competitor. Following the evidence provided by *Lenovo* itself, the Commission concluded that the rebates granted by *Intel* to *Lenovo* were *de facto* conditional on the latter obtaining all of its inputs from *Intel*. As in the abovementioned cases, the Commission stated that they constituted fidelity rebates within the meaning of the ECJ case law and that they had the effects of restricting *Lenovo*'s freedom of choice and preventing other competitors from supplying the needed inputs.⁶⁶

As already stated above, this shows that, notwithstanding the current trend towards an increasingly effects-based approach, the law of Art. 102 TFEU is still mainly rooted in the ECJ case law and its formalistic approach. The *Intel* decision demonstrates the manner in which the Commission will deal with conditional rebates in the future. The test that is most likely to be applied consists of recalling the relevant ECJ case law (*rectius*, the law) and thus going into a deep economic analysis aimed at proving the conditionality of the fidelity rebates schemes and subsequently applying the "as efficient competitor" test. Such an approach to these cases might be disputable and criticised. However, it appears arguable that the effectiveness of the approach is not questionable. As the Courts still seem reluctant to look at the effects, the Commission wants to ensure that it will win the case: first, by fleshing out the relevant case law and, then, by assessing the fidelity rebates from an economic perspective. The Commission's goal is of shaping the law. That is why the possibility of the European Courts adopting the Commission's approach⁶⁷ should not be ruled out.

c. The "As Efficient Competitor" Test ("AEC test")

Although the Commission does not have a general legal obligation⁶⁸ to carry out an extensive analysis of the effects of allegedly anti-competitive practices, in order to

⁶⁴ *Ibid.*, par. 981.

⁶⁵ *Ibid.*, par. 982.

⁶⁶ *Ibid.*, par. 989.

⁶⁷ It is not easy to state whether the GC will adopt the Commission's approach in the field of loyalty rebates. What can be stated with certainty, however, is that both under the formalistic approach and under the effects-based approach, *Intel* is not likely to succeed. The well-known tension between what is still the law of Art. 102 TFEU and *Guidance* should maybe lead us to conclude that a specialised court is needed.

⁶⁸ In fact, the Commission could have just kept on with a formalistic approach without going into a deep economic analysis through the AEC test. Indeed, strategically speaking, it would be enough for the Commission to simply refer to the relevant ECJ case law in order to win the case before the European Courts. However, the trend which has been inaugurated in *Microsoft (Commission decision of 24 March 2004)* and in *Telefonica (Commission decision of 4 July 2007)* has been confirmed by the *Intel* decision. Indeed, the Commission, after

demonstrate a coherent and consistent trend towards an increasingly economic approach in dealing with Art. 102 TFEU cases, especially those related to conditional rebates, the Commission applied its *Guidance*⁶⁹ and examined whether the exclusivity rebates under scrutiny were capable or likely to cause anticompetitive foreclosure through the well known “as efficient competitor test” (“AEC test”).⁷⁰ It is important to emphasise that according to this test, the Commission does not have to demonstrate the actual effects, but rather the likelihood or capability of anticompetitive effects upon consumers and competition. In order to do so, the Commission examines economic data, such as costs and sales prices, and whether the dominant undertaking is selling below a certain kind of viable cost.⁷¹

As was reiterated in the decision itself, the test’s purpose is to determine at what price a competitor that is as efficient as *Intel* would have to offer the same product to compensate a customer for the loss of the rebate.⁷² Indeed, the AEC is a hypothetical exercise, which is without prejudice to whether *Intel*’s competitor was actually able to enter the market or not.⁷³ To begin with, and in order for the AEC test to be carried out properly, what must be investigated is whether the dominant firm is an unavoidable trading partner as the dominant undertaking could use the non-contestable share of demand of customers as leverage to decrease the price for the contestable share of demand.⁷⁴

The Commission found that the contestable share of the buyers was relatively low⁷⁵ and that the relevant period was at most one year.⁷⁶ After the abovementioned factors had been assessed, the last parameter to be considered was the relevant measure of viable cost. Indeed, according to the *Guidance*, the Commission referred to the AACs as benchmarks to assess the exclusionary effects of the conditional rebates schemes. In fact, if an as efficient undertaking is forced to price below AACs, there is a quasi un-rebuttable presumption that competition is foreclosed because the efficient competitor incurs losses.⁷⁷ It is important to emphasise that the assumption according to which competition is hampered if the price is below AACs does not mean that a formalistic or *per se* rule is applied. In fact, this is an economic analysis. Although *Intel*, in the decision under review, agreed with the test, the issue was what costs should be included within the AACs “box”, such as, for instance, the marketing subsidy which *Intel* offered its customers under certain conditions⁷⁸, direct and indirect material costs⁷⁹, payroll costs⁸⁰, and office operations costs.⁸¹

Furthermore, as it is easy to guess, *Intel*’s AACs self-estimate excluded certain costs as it was argued that they must be seen as unavoidable. However, the Commission has stated that all the abovementioned costs are to be measured as avoidable costs. Therefore, the Commission concluded that, given all the relevant parameters, such as conditions for the

referring to the relevant case law in the field of conditional rebates, goes deeper into the costs analysis as it had never done before.

⁶⁹It is rather incorrect to state that the Commission has applied the *Guidance* in the *Intel* decision. In fact, formally speaking, the *Guidance* is not applicable *ratione temporis*. However, it can be held true that the Commission has shown how the legal reasoning would be once the *Guidance* is applied.

⁷⁰ See note 47 above, paras. 1002-1576

⁷¹ *Ibid.*, paras 25-26.

⁷² *Ibid.*, par. 1003.

⁷³ *Ibid.*, par. 1004.

⁷⁴ *Ibid.* par 1005.

⁷⁵ *Ibid.*, par 1012.

⁷⁶ *Ibid.*, paras 1015-1019.

⁷⁷ *Ibid.*, par. 1037.

⁷⁸ *Ibid.*, par. 1042.

⁷⁹ *Ibid.*, paras. 1083-1087.

⁸⁰ *Ibid.*, paras. 1088-1099.

⁸¹ *Ibid.*, paras. 1115-1117.

rebates, contestable share, reference period, and the costs measure, the AEC test has fleshed out what price an as efficient competitor would have to offer a trading partner to compensate it for the loss of any rebate. In other words, if this means that an as efficient competitor has to offer below a viable measure of *Intel's* cost, then the rebate is capable of reducing access to *Intel's* customers and thereby depriving final customers of the choice between different products.⁸² After analysing all the different rebates schemes *Intel* set up with its customers, the Commission concluded that, during the relevant period, *Intel* rebates were capable of having or likely to have anticompetitive foreclosure effects. One of the key points was also the strategic importance of some buyers.

d. *Intel's* competitor's increased market shares and the impact of *Intel's* discounts upon consumers

Intel argued that the Commission failed to address the evidence that shows that during the period of the alleged infringement, one of *Intel's* competitors substantially increased its market share and profitability and that its lack of success in certain market segments was the result of its own shortcomings. Indeed, *Intel* argued that *AMD* did well during and following the alleged exclusionary period.⁸³ The Commission began by noting that, according to the case law's formalistic approach, the notion of abuse is an objective one⁸⁴ and, therefore, the performance of competitors is not relevant for the enforcement of Art. 102 TFEU⁸⁵; it then pointed out that the performance of rivals in the market is also not relevant for the AEC test.⁸⁶ However, it continued by stating that the arguments related to *AMD's* performance did not demonstrate the absence of effects of the alleged anticompetitive practices.⁸⁷ Furthermore, what emerged from the economic analysis was that the effect of each conduct was such that *Intel's* customers cancelled, delayed, or placed restrictions on the planned commercialisation of *AMD*-based products for which consumer demand was increasing. It follows that competition on the merits has been harmed.⁸⁸

One of the other pleas in law raised by *Intel* is that the Commission has not demonstrated the impact of *Intel's* discounts upon customers. However, one can argue that this plea is pretentious indeed. In fact, the Commission has fleshed out that the rebates under scrutiny applied cumulatively to two levels of the distribution chain and involved the most strategically important buyers in the market.⁸⁹ Furthermore, as the rebates were tailored for each customer, it is clear that conditional rebates were *capable* of inducing loyalty limiting consumer choice and foreclosing the access of competitors on the market.⁹⁰ Moreover, the fact that *Intel* was able to exert control over the buyers in question and that,

⁸² *Ibid.*, par. 1154

⁸³ *Ibid.*, par. 1668.

⁸⁴ *Ibid.*, par. 1718.

⁸⁵ See, on this point, Case T-203/01 *Michelin II*, par 241; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge and Others v Commission*, para 149 confirmed in Joined Cases C-395/96 and C-396/96 *Compagnie Maritime Belge Transports and Others v Commission*, par 118-120; C-202/07 *France Telecom v Commission*, par 107-113

⁸⁶ See note 47 above, par.1733

⁸⁷ *Ibid.*, par. 1669

⁸⁸ *Ibid.*, par.1679

⁸⁹ *Ibid.*, par. 1597

⁹⁰ *Ibid.*, par. 1598

apart from holding a dominant position, it was an unavoidable trading partner, should lead us to conclude that *Intel* discounts schemes had a direct and immediate impact on consumers as well. Indeed, empirically, it is easy to notice that final consumers were artificially impeded from choosing other products because *Intel* prevented its competitor's product from being offered on the market.

e. "Single and Continuous Strategy"

Intel appears to argue that in order to find a "single and continuous strategy" the Commission would have to demonstrate the existence of a formal plan. However, one can also argue that *Intel's* position remains at odds with the alleged *per se*⁹¹ approach held by the Commission. Indeed, whilst on one hand the dominant firm alleges that the Commission has not demonstrated the effects of the practices under scrutiny, on the other hand it maintains that a formal agreement needs to be established in order for the Commission to find the infringements as part of one long-term single and continuous strategy. However, the fact that *Intel* aimed at foreclosing its competitor from entering the market emerges from the analysis of the abusive practices. As seems clear, the infringements at issue were targeted at the buyers and, though all the elements constituted individual abuses if taken out of the context, the dominant undertaking's behaviour was a reaction to the growing threat represented by its competitor, *AMD*.

Moreover, it is worth mentioning that *Intel* attempted to conceal the nature of its conduct and that, in its written communications, it has attempted to portray its behaviour in a manner that it believed would have not been viewed as suspicious.⁹² Indeed, the abovementioned practices took place in a consistent sequence of time, they were targeted at different and strategic buyers around the world, and the sought-after effect was that of foreclosing the competitor.⁹³ However, what is interesting in the Commission's decision with regards to this precise point is that, after pointing out that empirical evidence shows that indeed the strategy pursued by *Intel* was a single one, a reference is made to the relevant ECJ case law, according to which "*anti-competitive object and anti-competitive effects are one and the same thing*⁹⁴". This reference clearly shows that the Commission is interested in making it clear that *Intel* cannot escape from Art. 102 TFEU.

(C) Procedural Grounds

In light of what has been fleshed out above, it seems arguable that if *Intel* has any chance of having the decision annulled by the GC, this chance lies in the alleged infringement of procedural requirements.⁹⁵ However, it should also be noted that it is often the case that, once fined by the Commission either on an alleged breach of Art. 101 TFEU or Art. 102 TFEU, the undertakings usually argue before the European Courts that the rights of

⁹¹ As has been stated above, *Intel* made an explicit reference to an alleged *per se* approach.

⁹² *Ibid.*, paras. 1742-1743

⁹³ *Ibid.*, par. 1745.

⁹⁴ *Ibid.*, par. 1746; See also Case T-228/97, *Irish Sugar v Commission*, par 170.

⁹⁵ For a general view on the rights of the defence, see, *inter alia*, A. Andreangeli, *EU Competition Law and Human Rights*, (Edward Elgar Publishing, 2008); See also, M. Emberland, *The Human Rights of Companies*, (OUP 2006); W. Wils, *Principles of European Antitrust Enforcement*, (Hart Publishing 2005).

the defence have been breached in the procedure. Indeed, one can also argue that the “fairness defence” is sometimes a sort of plea of last resort. It will be interesting to see what will happen after the EU’s accession to the ECHR.⁹⁶

Nonetheless, as has already been argued above, this paper’s author maintains that it is highly unlikely that *Intel* will have any chance of having the decision annulled on substantive grounds. Indeed, should the European Courts follow the formalistic approach or side with the *Guidance* effects-based approach, the dominant firm will not be able to escape from Art. 102 TFEU. Additionally, as it will be shown below, it is argued that the GC should not annul the decision as no right of the defence has been infringed. Finally, it does not seem that, should the Courts discover that the abovementioned rights have been infringed, *Intel* could prove that the outcome of the decision would have been different.⁹⁷

a. The refusal to grant an oral hearing in relation to the SSO and to the letter of facts

To begin with, it must be recalled that the right to be heard is enshrined in Art. 27 of Regulation 1/2003⁹⁸, according to which the undertakings which are the subject of the proceedings carried out by the Commission must be granted the opportunity to be heard on the points to which the Commission has taken objection. In addition, Reg. 773/2004 sets out the manner in which the right to be heard must be exercised; it states that both parties and interested parties with a sufficient interest enjoy the right to be heard and that the hearing be conducted by the Hearing Officer (“HO”), whose role has been established in a Commission’s Decision.⁹⁹ In addition, the *Commission’s Best Practices for the Conduct of Proceedings concerning Articles 101 and 102 TFEU*¹⁰⁰ and Art. 41 of the Charter of Fundamental Rights of the European Union (“CFREU”) should be considered.¹⁰¹

The point raised relates to the fact that the Commission notified *Intel* with a Supplementary Statement of Objections (“SSO”), setting a deadline of 8 weeks to submit its reply. However, the HO decided to extend the deadline from July 17th, 2008 to October 17th, 2008. Whilst *Intel* brought an action before the then Court of First Instance¹⁰² seeking, *inter alia*, the annulment of the HO’s decision to grant the extension, it failed to reply to the SSO by the new deadline. Thus, the Commission sent *Intel* a letter regarding a number of specific

⁹⁶ On the impact of the EU accession to the ECHR, see, *inter alia*, W. Wils, “EU Antitrust enforcement power and procedural rights and guarantees: the interplay between EU law, National law, the Charter of fundamental rights of the EU and the European Convention on Human Rights” W. Comp, (2011) 34 and “The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?”, in Kosta, Skoutaris & Tzevelekos (eds), *The Accession of the EU to the ECHR*, (Hart Publishing, 2014);

⁹⁷ It is important to refer to the so-called “functional approach”.

⁹⁸ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003- 0001-0025.

⁹⁹ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of referenc of the hearing officer in certain comeptition proceedings, OJ L 275, 20.10.2011, p. 29.

¹⁰⁰ Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/06, 20-10-2011.

¹⁰¹ Art. 41 (1) and (2) of the CFREU reads as follows: (1) Every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the Union; (2) This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions”.

¹⁰² Case T-457/08, *Intel Crpn v Commission*, nyr.

items of evidence relating to the Commission's objections. The deadline to submit comments was set for January 19th, 2009 and subsequently extended to January 23rd, 2009. *Intel* failed to reply by the extended deadline without providing any reasons. *Intel* then filed its reply to the SSO and to the letter on February 5th, 2009. At this stage of the procedure, *Intel* asked to be granted an oral hearing in relation to the SSO.

According to the Commission's decision, the failure to reply to the SSO by the extended deadline and its decision not to send a request for an oral hearing to the SSO before February 2009 entailed that the HO decided not to grant the hearing as the "*subjective right to have an oral hearing exists until the end of the deadline to reply to the statement of objections*". Indeed, the HO made it clear that once that the deadline has elapsed, he or she can exercise his or her discretion: indeed, after examining *Intel's* arguments, the HO stated that "*granting an oral hearing under these circumstances and at this stage of the procedure would risk causing serious difficulties in the proper and timely conduct of this procedure*".¹⁰³

Although, at first glance, it would seem that the Commission has failed to ensure compliance with the right to be heard, one could argue that the rights of the defence have been duly respected in the procedure in question. Indeed, according to the *Code of Best Practices*¹⁰⁴ every party to which the SO has been addressed has the right to an oral hearing, which may be requested within the time limit set for the written reply to the SO.¹⁰⁵ This is especially true if the Commission, once that the SO has been issued, identifies new evidence that it wants to rely upon or if it intends to change its legal assessment to the disadvantage of the undertakings concerned.¹⁰⁶ Should this be the case, the alleged infringer shall be given the opportunity to present observations.

Furthermore, if additional objections are issued or if the nature of the infringement is modified, the Commission must so notify through a SSO.¹⁰⁷ On the other hand, if the objections that have already been raised in the SO are corroborated by new evidence the Commission intends to rely on, a letter of facts will be issued. The undertaking can answer within the fixed time limit.¹⁰⁸ However, it must be pointed out that the rules on the time limit for the reply to a SO apply¹⁰⁹ and that *Intel* has been given the possibility of asking and obtaining another oral hearing.¹¹⁰ It follows that it will be highly unlikely that the European Courts will find in favour of *Intel* with regards an alleged breach of the right to be heard.

b. Any Duty to Procure Internal Documents?

One of the other main pleas in law related to procedural grounds is that *Intel* complains that the Commission failed to procure certain internal documents for the case file from the competitor when requested by the applicant, notwithstanding that, according to *Intel*, the documents were directly relevant to the Commission's allegations, were

¹⁰³ See note 47 above, par. 99

¹⁰⁴ See note 100 above

¹⁰⁵ *Ibid.*, par. 106.

¹⁰⁶ *Ibid.*, par 109.

¹⁰⁷ *Ibid.* par 110.

¹⁰⁸ *Ibid.*, par. 111.

¹⁰⁹ See note 100 above.

¹¹⁰ See the Final report of the Hearing Officer in Case COMP/C-3/37.990-Intel, OJ 2009/C 227/06, 22.09.2009.

potentially exculpatory, and had been identified with precision.¹¹¹ The documents concerned the private litigation between *AMD* and *Intel* in the US State of Delaware. *Intel* claimed that the Commission should have sought to obtain them and provide them to *Intel*; indeed this is the main argument relied on from the dominant firm to argue that the Commission's procedure should have been suspended and that an extension of the time limit to answer to the SSO should have been granted. In other words, *Intel* claims that it has been prevented from exercising its rights of the defence. According to the dominant firm, those documents were likely to be exculpatory¹¹² as they were likely to contain information on alleged *AMD*'s technical or commercial issues that made its products unattractive as compared to *Intel*'s.¹¹³

The Commission contended that, besides the fact that the file already contained enough material to allow the Commission to form an impartial judgement, *Intel*'s requests were not specific enough to identify the documents that might have been relevant for the investigation.¹¹⁴ Moreover, the Commission pointed out that the documents *Intel* refers to could not be either actually nor potentially exculpatory as they relate to *AMD* performance; according both to the law of Art. 102 TFEU, that is to say according to the formalistic approach of the ECJ case law, and to the effects-based approach followed by the Commission in the AEC test, the dominant undertaking's competitor performance on the market is irrelevant.¹¹⁵ The HO added that the right to obtain access to the file has been ensured¹¹⁶ and that he or she is not empowered by its mandate or by the case law to order investigations in order to complete an allegedly incomplete file; for these reasons, *Intel*'s requests should be considered as *ultra vires*¹¹⁷.

c. Any duty to make a proper note of the meeting between the Commission and *Dell*'s executives?

Nonetheless, even if it is highly unlikely that the European Courts will rule in favour of *Intel* on the alleged failure to grant a supplementary oral hearing after the given deadline and on the alleged failure to procure certain internal documents related to the *Intel/AMD* US litigation, it is not clear whether *Intel* could succeed in its action on the ground that the Commission has allegedly failed to make a proper note of its meeting with a key witness from one of the *Intel*'s customers, who, in *Intel*'s view, might have given exculpatory evidence.

On this point, the dominant firm is referring to a meeting held between the Members of the Commission's case team and some of the *Dell*'s executives. *Intel* complained that the Commission failed to take note of the meeting and this failure should be considered an infringement of *Intel*'s rights due to the fact that one of those executives had previously provided an allegedly favourable testimony to the US agency.¹¹⁸ In support of

¹¹¹ See note 1 above

¹¹² See note 95 above;

¹¹³ See note 47 above, par. 61.

¹¹⁴ *Ibid.*, par. 64

¹¹⁵ *Ibid.*, par. 65

¹¹⁶ See note 110 above

¹¹⁷ *Ibid.*

¹¹⁸ See note 47 above, par. 39

this claim, the dominant undertaking emphasised that a document referred to an indicative list of topics discussed with *Dell* in the meeting at issue, and that, therefore, the document should be considered as an “agenda of the meeting” that the Commission failed to provide to *Intel* when getting access to the file.¹¹⁹ The key points the dominant undertaking relies on are the fact that the Commission did not take note of the meeting, that it did not take note because the evidence was exculpatory, and that it refused to grant access to a note that had been written at a subsequent time.¹²⁰

The Commission, on the other hand, made it clear that there is no general obligation to take minutes of meetings.¹²¹ Indeed, in *TACA*¹²² and *Danone*,¹²³ the then CFI stated that whenever the Commission intends to use inculpatory evidence provided orally by a party, it must make it available to the undertaking concerned so that the latter is able to comment effectively and that, when necessary, it must be written in a document to be placed in the file. This is certainly a strong procedural safeguard. However, it seems difficult to argue against the fact that the Commission, at least apparently, did not make use of any information provided orally in the meeting in question to incriminate *Intel* which, on the contrary, maintains that one of the executives would have brought exculpatory evidence as was the case in the testimony before the US agency. Indeed, the Commission insisted that there is no obligation to take minutes of meetings, except when inculpatory evidence is sought and used in the final decision.

Moreover, with regards to the note written subsequently to the meeting with *Dell* and to which *Intel* was not granted access, the Commission argued that the document must be considered as an internal document reporting nothing more than personal impressions of one of the case-handlers, that it was not intended to constitute inculpatory or exculpatory evidence, and that it was not drafted to be agreed by the meeting’s attendees. However, the Commission contended that, although it was under no duty to disclose such a document, a non-confidential version was provided to *Intel*. In addition, in the Commission’s opinion, it could not be held true that the existence of the meeting was concealed. In fact, as has been stated above, because the document was considered as internal, it was not meant to be part of the file. However, in the course of the access to the file, the HO decided that that document had to be placed in the file but that access had to be denied due to the fact that it was to be classified as internal.

Nonetheless, it is worth mentioning that *Intel* lodged a complaint to the Office of the European Ombudsman (“EO”)¹²⁴ alleging that the Commission failed to take minutes of the abovementioned meeting despite the fact that it was directly concerned with the subject matter of the investigation, and that a record of potentially exculpatory evidence was not made.¹²⁵ Indeed, after recalling that the Commission enjoys a “reasonable margin of

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) no. 139/2004, OJ C 325, 22.12.2005, 7-15, par 13.

¹²² See Joined Cases T-191/98 and T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275 (*TACA*), 349-359.

¹²³ See Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, par 66.

¹²⁴ Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission, 14.07.2009.

¹²⁵ *Ibid.*

*discretion as regards its evaluation of what constitutes a relevant fact*¹²⁶, the EO emphasised that the Commission has a duty to remain independent, objective, and impartial¹²⁷ in exercising its investigatory powers.

Indeed, the issue here relates very much to the power to take statements as set out in Article 19 of Regulation 1/2003, according to which “*the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation*”.¹²⁸ However, the Commission maintained that it had no obligation whatsoever to draft minutes of meetings with any person or undertaking. In fact, the Commission argued that, as it appears from the *Notice on Access to the File*, should it ever choose to take notes, those must be classified as internal documents.¹²⁹ The Commission argued that this view is consistent with the ECJ case law and that the meeting in question was not an “interview” within the meaning of Art. 19 of Regulation 1/2003.

The EO made it clear that an interview could fall within the scope of Art. 19 of Regulation 1/2003 if its purpose is to collect information relating to the subject of an investigation. However, it can also be held that the Commission enjoys a reasonable margin of discretion on whether to conduct an “Article 19 interview” or not.¹³⁰ It follows that, according to the EO’s view, the document seemed to indicate that the issues to be discussed were related to the subject matter of the investigation and that, therefore, the Commission’s purpose was to gather information. Moreover, even though the note in question contained the impressions of one of the case handlers, it also contained factual information provided by one of *Dell’s* executives related to a few issues discussed in the meeting.

In addition, it seemed clear that the purpose and content of the meeting directly concerned the gathering of information from *Dell* concerning the subject matter of the investigation.¹³¹ The EO therefore concluded that in the meeting at issue, the Commission sought information directly related to the subject matter of the investigation and that the issues actually discussed related directly to the subject matter of the investigation as well. These are the reasons why, perhaps, the meeting in question should have been classified as an “Article 19 interview”.¹³² Be that as it may, the interesting issue seems to be the fact that the European Courts have not had the occasion to provide an interpretation of Art. 19 of Regulation 1/2003 as of yet.

Indeed, as the EO pointed out¹³³, Regulation 773/2004¹³⁴ sets out the obligations¹³⁵ that the Commission must comply with once a meeting has been characterised as an “interview” within the meaning of Art. 19 of Regulation 1/2003. It seems worth mentioning

¹²⁶*Ibid.*, par 82. See also Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, par 18.

¹²⁷Case T-201/04, *Microsoft* [2007] ECR II-3601, par 1275.

¹²⁸See note 98 above.

¹²⁹See note 124 above, par.12.

¹³⁰See note 121 above, par.88.

¹³¹*Ibid.*, par 90.

¹³²*Ibid.*

¹³³*Ibid.*, par 92.

¹³⁴See Art. 3 of the Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004, p.18.

¹³⁵Namely the obligation to state the legal basis and the purpose of the interview, the obligation to recall the voluntary nature of the interview, and the obligation to inform the person interviewed of its intention to make a record of the interview.

that the Courts have not had the possibility of ruling on Art. 3 of Regulation 773/2004 either and that, therefore, it is not clear whether the Commission's failure to take proper note of the meeting constitutes a breach of the law or is simply an act of maladministration. Indeed, the EO emphasised that the concept of maladministration is much broader than the concept of illegality.¹³⁶

Should it be assumed that the Commission enjoys a certain margin of discretion with regards to creating a record of an interview with a third party in which information relating to the subject matter of an investigation is gathered, the EO made it clear that there could be situations where even the principles of good administration might not require a proper note.¹³⁷ In fact, if the information is already included in the file because the Commission obtained such information from another source, the principle of good administration might not require a proper note to be drafted. This is different from the situation in which the information at issue was not already in the Commission's hands. In fact, if the non-recorded information constituted exculpatory evidence, the Commission might have infringed the rights of the defence.¹³⁸

However, the EO stressed that the Commission must take into account the identity of the persons being interviewed when exercising its discretion to make a record of an interview. In fact, in the case in question, it seems important to emphasise that the person involved was a *Dell* executive who was responsible for the relationship with *Intel* and thus a direct witness of the circumstances. He was also accompanied by his senior in-house counsel and by a senior outside-counsel. In addition, he knew that the Commission had documents relating to his testimony before the US agency in 2003 in its possession.

Furthermore, the EO stated that a proper record of an interview should describe all the information related to the subject matter of the investigation provided in the interview and that, consequently, Art. 3 of Regulation 773/2004 imposes a legal obligation that a copy of any recording must be made available to the person interviewed for approval. In addition, the EO stated that if the Commission gathers information relating to the subject matter of the investigation, it should add this information to the file.¹³⁹

However, as has been stated above, the EO noted that even if it were assumed that there is no legal obligation to record an Art. 19 interview in all circumstances and even if it were accepted that such an interview should not be categorised as an Art. 19 interview, the principle of good administration requires that a proper record is made and subsequently included in the file.¹⁴⁰ As stated above, an exception could be made when the information is already in the file. However, as it emerged from the facts, the EO acknowledged that not all the information supplied by *Dell* was already in the file.¹⁴¹ Therefore, the Commission did gather information relating to the subject matter of the on-going investigation, some of which was not in the file¹⁴² and, as it did not make a proper note of that meeting, it therefore breached the principle of good administration.¹⁴³

¹³⁶ See note 121 above, par 95

¹³⁷ *Ibid.*, par. 97

¹³⁸ *Ibid.*, par. 98

¹³⁹ *Ibid.*, par. 104

¹⁴⁰ *Ibid.*, par. 111

¹⁴¹ *Ibid.*, par. 112

¹⁴² *Ibid.*, paras. 111-113

¹⁴³ *Ibid.*, par. 114

However, the EO emphasised¹⁴⁴ that not every procedural irregularity is sufficient to vitiate a Commission decision. It is a general principle that an applicant seeking the annulment of an administrative decision on the grounds of a procedural irregularity must show that there might be a possibility that the outcome of the administrative procedure would have been different but for the irregularity.¹⁴⁵ For instance, where an alleged breach of the rights of the defence occurs, the decision could be annulled only if the rights of the defence and, therefore, the content of the decision have been affected.¹⁴⁶

Furthermore, the EO made it clear that the rights of the defence of a party under investigation are not deemed to be infringed if the Commission fails to take minutes of meetings or telephone conversations in which no information is provided to the Commission, such as purely procedural matters.¹⁴⁷ In addition, even if the Commission obtains inculpatory evidence that is not used in the decision, it cannot be considered as an infringement of the rights of the defence.¹⁴⁸ Furthermore, if the Commission obtains inculpatory evidence which is already included in the file and fails to draw up and include in the file a record of such a meeting, and even if it relies on the inculpatory evidence in its decision, that is not a breach of the rights of the defence.¹⁴⁹

With regards to exculpatory evidence, the EO pointed out that it is not possible to argue that the rights of the defence have been infringed if there is simply a possibility that such exculpatory evidence was provided to the Commission by third parties.¹⁵⁰ However, the EO did not exclude that, at least in part, the meeting in question concerned exculpatory evidence nor did he exclude that that information was already partly in the file.¹⁵¹

Nonetheless, one can argue that the European Courts should not rule in favour of *Intel* with regards to the alleged breach of procedural requirements as materially infringing the rights of the defence. In fact, even if neither the GC nor the ECJ have ever ruled on the interpretation of Art. 19 of Regulation 1/2003, it seems arguable that the Commission does not have any legal obligation to take minutes of meetings unless inculpatory evidence related to the subject matter of the case is sought and used in the final decision. Indeed, the Commission enjoys a reasonable margin of discretion when deciding on the use of Art. 19 of Regulation 1/2003.

Furthermore, an act of maladministration is different from the breach of a legal rule and, even if it might be arguable that the Commission has breached the principle of good administration, it is not clear whether a legal norm has been violated. However, even if the GC finds that a legal norm has been breached or that there has been a violation of what is now Art. 41 of the CFREU, *Intel* would have to prove the possibility that the outcome of the

¹⁴⁴*Ibid.*, par. 116

¹⁴⁵See Case 90/74 *Deboeck v Commission* [1975] ECR 1123, Case 30/78, *Distillers Company v Commission* [1980] ECR 2229, par. 26, and Case T-50/91 *De Persio v Commission* [1992] ECR II-2365, par. 24.

¹⁴⁶See, for example, Case T-75/06 *Bayer Crop Science and Others v Commission*, par. 131. Indeed, as has been stated above, a decision cannot be annulled, in whole or in part, on the grounds of a lack of proper access, unless it is found that that lack of proper access to the investigation file has prevented the undertakings, during the administrative procedure, from perusing documents which were likely to be of use in their defence (see also Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, par. 101).

¹⁴⁷See note 121 above, par. 120

¹⁴⁸*Ibid.*, par. 121

¹⁴⁹*Ibid.*, par. 122

¹⁵⁰*Ibid.*, par. 124

¹⁵¹*Ibid.*, par. 127

decision would have been different. It follows that it does not seem probable that *Intel* would be able to show that a different outcome would have occurred. In fact, the key point of the *conundrum* seems to be the *Dell's* testimony before the US agency. Indeed, *Intel* argues that the Commission should have taken minutes of the meeting with *Dell's* executives because they would have given exculpatory evidence.

This argument is made on the basis of the allegedly exculpatory evidence that *Dell's* executives provided to the US agency. However, it does not seem arguable that the content of that testimony could challenge the findings of the Commission, that is to say that *Intel* did not abuse its dominant position by setting up conditional rebates schemes which were likely or capable of having anticompetitive effects. In fact, the Commission has made reference to both the rather formalistic approach preferred by the Courts and to the effects-based approach that is enshrined into the *Guidance*. The Commission has carried out an economic test with a thorough analysis of the nature of the rebates at issue and with a sound application of the AEC test. It follows that the Commission decision is based on two main arguments: firstly, *Intel's* behaviour infringes Art. 102 TFEU according to the relevant ECJ case law, which is the law of the abuse of dominant position; and, secondly, *Intel's* behaviour infringes Art. 102 TFEU from an effects-base approach, that is to say from the *Guidance's* perspective.

These are the reasons why it seems arguable that the European Courts should not rule in favour of *Intel*. In fact, it is arguable that neither the procedural requirements nor the rights of the defence have been materially infringed because the Commission enjoys a reasonable degree of discretion when it comes to Art. 19 of Regulation 1/2003 interviews. However, as has been said above, the Courts have not ruled on the interpretation of this article as of yet. Nonetheless, should they find that a right of the defence has been infringed, according to what has been set out above, it is highly unlikely that *Intel* would be able to demonstrate that the content of the decision would have been altered.

Conclusion

This purpose of this paper was to analyse the Commission's approach towards loyalty rebates in the *Intel's* decision and demonstrate that there does not seem to be any fat left on the bone. Indeed, as has been shown, the Commission's approach lies somewhere between the *Tomra* case, the relevant ECJ case law, and the *Guidance*. In fact, after analysing the outcome of *Tomra*, which appears to represent a step backward towards a more formalistic *approach*, it has been argued that the manner in which the GC and the ECJ handled the case is not surprising due to the well-known tension between the European Courts' view of Art. 102 TFEU and the Commission's vision of the law of exclusionary behaviour.

Nonetheless, although the *Tomra* case does have an ambiguous outcome, *Intel* is genuinely the first Commission decision that applies the *Guidance* in full. This is without prejudice to the fact that the *Guidance* was not *ratione temporis* applicable to the case at issue. However, what has been argued is that this would be the Commission's manner of handling similar cases in the future: after reviewing the relevant case law, which adopts a rather formalistic approach, it went on with a thorough economic analysis aimed at demonstrating that the schemes under scrutiny were conditional and that they were likely

or capable of anticompetitive effects. Indeed, it cannot be argued that the AEC test was not carried out properly. The Commission also brilliantly pointed out that the competitor's performance on the market is irrelevant in the case law and for the AEC test and that *Intel's* behaviour had an impact on consumers. It follows that one can argue that *Intel* is unlikely to succeed on substantive grounds.

The second part of this paper analysed whether there could be any possibility for *Intel* to have the decision annulled on procedural grounds. After taking into consideration the first procedural plea raised by the dominant firm, according to which a second oral hearing after the SSO and the letter of facts should have been granted to *Intel*, it seems arguable that, as it was made clear by the HO and as it is explained in the *Code of Best Practices*, there is no right to a second hearing once the deadline has expired. With regards to the Commission's alleged duty to procure documents which were not in the file, namely the ones related to the US litigation, it seems arguable that there is no such duty and that the file was therefore complete. Moreover, the documents *Intel* referred to could not be deemed exculpatory as they relate to *AMD* performance on the market. This is irrelevant both from the case law and the *Guidance's* perspective.

With regards to the alleged breach of duty to take minutes of the meeting, it seems arguable that, according to what has already been pointed out by the EO, an act of maladministration is different from the breach of a legal norm. Indeed, the European Courts have not ruled on the interpretation of Art. 19 of Regulation 1/2003 as of yet. If, on one hand, it might be argued that the Commission enjoys a reasonable degree of discretion when it comes to Art. 19 interviews, and therefore there is no general duty to take minutes of the meetings unless inculpatory evidence is sought and used in the final decision, on the other hand, it must be said that, should the Courts find a breach of a procedural requirement or of a right of the defence, *Intel* would have to demonstrate at least a possibility that the decision would have had a different outcome.

The main reason for the dominant firm's argument that the Commission should have taken minutes of the meeting with *Dell's* executives was the potential for exculpatory evidence; however, it seems unlikely that the decision at issue would have had a different outcome. Indeed, *Intel's* main argument relates to the content of the testimony given by *Dell's* executives before the US agency. That testimony does not call into question either the law of Art. 102 TFEU or the Commission's economic analysis and the AEC test, according to which the rebates schemes were conditional and were likely or capable of having anticompetitive effects. In conclusion, this paper argues that the Courts should not rule in favour of *Intel* either on substantive and/or procedural grounds.