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Supervisor: Prof. Schrauwen, A.A.M.

Second Reviewer: Galama, A.S.M.

Lucio Di Cicco st. no. 11097299

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## **THE PRICE OF LOYALTY: THE INCONSISTENCIES OF THE ECJ'S ORDOLIBERAL APPROACH TOWARDS REBATES**

### **ABSTRACT**

*The ECJ's approach on rebates shows many contradictions and it is in contrast with the instructions contained in the Guidance paper on the enforcement of Article 102 TFEU issued by the Commission. This thesis aims to examine these contradictions and to understand the reasons of this inconsistent approach. The analysis of the genesis and the enforcement of Article 102 TFEU reveals that the main reason of these inconsistencies is the tension between the Ordoliberal protection of competitors' economic freedom and the increasing need to justify the finding of an abuse on a sound economic basis in order to protect consumer welfare.*

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## INTRODUCTION

During the recent years the case law of the General Court and the Court of Justice (hereinafter together ‘ECJ’) on rebates has been strongly criticised by many scholars and practitioners,<sup>1</sup> in particular after the recent decisions in *Intel*<sup>2</sup> and *Post Danmark II*.<sup>3</sup> The approach of the ECJ towards rebates is a form-based approach which distinguishes between (i) pure quantitative rebates, (ii) exclusivity or quasi-exclusivity rebates and (iii) all different kinds of rebates that do not fit into the first two categories (hereinafter also ‘third category rebates’ or ‘loyalty inducing rebates’). While pure quantitative rebates are considered presumptively legal, exclusivity or quasi-exclusivity rebates are considered presumptively illegal under a quasi per se rule. As regards the third category rebates, it should be necessary to consider all the relevant circumstances. However, it seems that a quasi per se rule is used also in cases of retroactive and individualised rebates, at least when they are based on a reference period of one year. This approach is in contrast with the indications given by the Commission in its Guidance Paper on the enforcement of Article 102 TFEU to exclusionary practices.<sup>4</sup> In particular, the ECJ rejected the relevance of the so-called ‘as efficient competitor’ test (hereinafter ‘AEC test’).

The approach of the ECJ has been defined as Ordoliberal by many commentators because it is formalistic and it aims to protect the individual economic freedom of competitors rather than consumer welfare. It is worth noticing, moreover,

<sup>1</sup> Geradin D., *Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffmann-La Roche*, *Journal of Competition Law & Economics*, 2015, 11(3), p. 579; Rey P. & Venit J.S., *An Effect Based Approach to Article 102: A Response to Wouter Wils*, *World Competition*, 2015, 38, p. 3; Venit J.S., *Case T-286/09 Intel v Commission – The Judgement of the General Court: All Steps Backwards and no Step Forward*, *European Competition Journal*, 2014, 10(2), p. 203; Ahlborn, C. & Piccinin, D., *The Intel Judgement and Consumer Welfare – A Response to Wouter Wils*, *Competition Law & Policy Debate*, 2015, 1, p. 60; Sher, B., *Keep Calm - Yes; Carry on - No! A Response to Whish on Intel*, *Journal of European Competition Law & Practice*, 2015, 6(4), p. 219; Sher, B., *Price Discounts and Michelin 2: What Goes Around, Comes around*, *European Competition Law Review*, 2002, 23(10), p. 482; Jones A. & Sufrin B., *The European Way – Reflections on the Intel Judgement*, *Competition Law and Policy Debate*, 2015, 1, p. 32; Crane D.A., *Conditional Pricing and Monopolization: A Reflection on the State of Play*, *Competition Law and Policy Debate*, 2015, 1, p. 44; Petit, N., *Intel, Leveraging Rebates and the Goals of Article 102 TFEU*, 2015, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567628)

<sup>2</sup> Case T-286/09 *Intel Corp. v Commission* [2014] ECLI:EU:T:2014:547 (not yet published, hereinafter ‘*Intel*’). The case is under appeal before the Court of Justice in Case C-413/14, *Intel Corp. v. Commission* (not yet decided).

<sup>3</sup> Case C-23/14, *Post Danmark A/S v Konkurrencerådet*. [2015] ECLI:EU:C:2015:651 (not yet published, hereinafter ‘*PostDanmark II*’).

<sup>4</sup> Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/02 (hereinafter ‘the Guidance’).

that also those authors that tried to prove the Ordoliberal foundations of EU competition law argued that such an origin was confirmed by the jurisprudence of the Court on rebates.<sup>5</sup>

The purpose of this thesis is twofold. Firstly, it aims to verify whether the jurisprudence of the ECJ on rebates is consistent also with respect to decisions on different types of exclusionary abuses. Secondly, it aims to ascertain the reason of the inconsistencies. In particular, this second question triggers considerations on the goals of Article 102 TFEU. Therefore it is necessary to analyse the Schools of thought that influenced the genesis of competition law and its development. In the light of this appraisal it will be possible to understand not only what the ECJ is protecting, but also whether its approach can be deemed somehow justified.

With respect to the methodology, this thesis is based on the analysis of primary and secondary law as well as soft law documents issued by the Commission, preparatory documents, case law, doctrine, speeches and statements made by Treaties' drafters and Commissioners.

## CHAPTER 1

### **1. The Origin and Development of US Antitrust Law in a nutshell**

In 1890 the US congress adopted the Sherman Act, which aimed to ban restraints on trade by means of agreements, practices and the establishment of monopolies by firms.<sup>6</sup> The Sherman Act represented a significantly innovation. Indeed, for the first time the law was not only concerned about the contractual freedom of the parties, but also about any restraint of trade that could affect the conditions of the market in an anticompetitive way.<sup>7</sup> In 1914 the Congress adopted the Clayton Act that introduced additional rules to protect small firms from certain exclusionary practices, which could lead to anticompetitive restrictions. In particular, the Clayton Act was focused on price discrimination, exclusive contracts, 'tie-ins' and

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<sup>5</sup> See Gerber D.J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Clarendon Press, 1998 and Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance in European Competition Law*, Cambridge University Press, 2010.

<sup>6</sup> Amato G., *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, Hart Publishing, 1997, pp. 7-8.

<sup>7</sup> Ibid. pp. 9-10. See also Hovenkamp H., *The Sherman Act and the Classical Theory of Competition*, Iowa Law Review, 1989, 74, p. 1019 and Handler M., *Trade Regulation. Cases and other Materials*, Foundation Press Brooklin, 1960, p. 104.

concentrations.<sup>8</sup> This second act was particularly focused on issues raised by the market power and it was influenced by the thinking of the Harvard School. This economical approach was focused mainly on the structure of the market and it developed the so-called S-C-P paradigm based on the belief that there is a causal relation between structure, conduct and performance.<sup>9</sup> According to this theory the performance of economic operators is determined by their conduct, which, in turn, is determined by the structure of the market. Since the origin of the causal chain was the market structure, according to the Harvard School this was the element on which antitrust law should intervene. Indeed, by protecting the structure of the market it would be possible to condition the behaviour and then the performance of undertakings, ensuring an efficient outcome. The Harvard School believed that antitrust law has more than one goal. Indeed, it saw as essential several objectives, such as consumer sovereignty, distribution of equity and control of economic power.<sup>10</sup> The Harvard School focused its attention on the distortions provoked by market power on the market structure. Hence, the main concerns related to market share, concentrations and barriers to entry.

This theory inspired the antitrust law interpretation of both authorities and courts,<sup>11</sup> which adopted an interventionist approach in particular with respect to unilateral conducts, mergers and vertical restraints.<sup>12</sup> The Harvard School, moreover, paid particularly attention to the protection of small and medium firms from the misuse of market power. This trend can also be noted in some judgments of US courts.<sup>13</sup> In particular, in the merger case *FTC v Brown Shoe Co.* the Court affirmed that, although it was competition and not competitors that needed to be protected, it was also necessary to protect small firms against market power.<sup>14</sup>

During the 50s Aaron Director, a professor of the Chicago University, begun

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<sup>8</sup> Amato G., *Antitrust and the Bounds of Power*, cit., p. 15

<sup>9</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 30.

<sup>10</sup> Cseres K. J., *Competition Law and Consumer Protection*, Kluwer Law International, 2005 and Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 31.

<sup>11</sup> For instance see *Us v Aluminium Co. of America*, 148, F.2d, 416 (2nd Cir. 1945); *American Tobacco Co. v United States*, 328 US 781 (1946); *US v United Shoe Machinery Corp.*, 110 F. Supp. 295 (1953), 347 US 521 (1954). See Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 31.

<sup>12</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., pp. 31-32. See also Kovacic W., *The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, Columbia Business Law Review, 2007, p. 6 and Fox E. & Sullivan L., *Antitrust – Retrospective and Prospective: Where Are Coming From? And Where Are We Going?*, New York University Law Review, 1987, 62, pp. 936-954.

<sup>13</sup> Amato G., *Antitrust and the Bounds of Power*, cit., pp. 16-19.

<sup>14</sup> *FTC v Brown Shoe Co.*, 384 US 316 (1966)

to research deeply into antitrust issues developing a new approach which was then followed by other scholars and became the so-called Chicago School. During the 70s this new approach replaced the Harvard School as major and most widespread economic thinking in the antitrust sector.<sup>15</sup> The Chicago School questioned many principles that underpinned the thinking of the Harvard School, shifting the focus from the competition process to the competition outcome. The first concern of the Chicago School was the consumer welfare, which in their view was the sole goal of competition law. It is not possible to describe here the Chicago theory in detail, however, they believed that economic operators are rational and aim to maximise their profits. Moreover, Chicagoans argued that market tends to efficiency and market imperfections are temporary.<sup>16</sup> This approach was focused on efficiencies and, therefore, its main concerns were the increase of prices and the reduction in the production output. In the Chicago School's view 'per se' prohibitions should be avoided. Indeed, only an analysis on a case-by-case basis founded on economic data could be reliable. Legal categories were regarded by Chicagoans as rigid and not suitable to understand the real meaning of firms' behaviour, because they could lead to the prohibition of efficient, and thus, pro-competitive, conducts. This approach took the name of 'rule of reason'. According to the Chicago School, for instance, vertical agreements should not be prohibited 'per se'. In fact, economic analysis can reveal, for instance, that they are aimed to avoid the so-called 'free rider' problem. Only horizontal cartels were considered as presumptively illegal, but even in this case the Chicago School maintained that a 'rule of reason' approach was necessary.<sup>17</sup> Since the 70s the US Supreme Court adopted some of the Chicago School principles, founding its judgments on the rule of reason approach.<sup>18</sup>

Over the years the Chicago School received many criticisms in relation to the role played by market imperfections in determining the strategic firms' behaviour<sup>19</sup> and the assumption that antitrust law should protect only economic efficiencies.<sup>20</sup> The

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<sup>15</sup> Amato G., *Antitrust and the Bounds of Power*, cit., p. 20.

<sup>16</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 38. See also Bork, H., *The Antitrust Paradox*, The Free Press 1993

<sup>17</sup> Amato G., *Antitrust and the Bounds of Power*, cit., p. 22.

<sup>18</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., pp. 36-37. See for instance, *Continental TV Inc. v GTE Sylvania Inc.*, 433 US 36 (1977); *United States Steel Corp. v Fortner Enterprises Inc.*, 429 US 610 (1977) and *State Oil v Khan*, 522 US 3 (1997).

<sup>19</sup> Hovenkamp H., *Antitrust Policy after Chicago*, Michigan Law Review, 1985, 84, p. 213.

<sup>20</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 37. See also Peritz R.J., *A Counter History of Antitrust Law*, Duke Law Journal, 1990, 40(2), p. 263; Lande R.H., *Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*,

so-called Post-Chicago School has represented one of the most important new approaches in the US antitrust. This School of thought shared the basic belief that the antitrust analysis is mainly an economic analysis. Nonetheless, it disagreed with the Chicago School about some of its assumptions. In particular, according to the Post-Chicago School, economic efficiencies are not the sole goal of antitrust because “wealth maximisation must include everything to which people assign a value”.<sup>21</sup> Moreover, the Post-Chicago School did not believe in self-correcting markets. By contrast, according to this School of thought firms can exploit market imperfections in order to take anticompetitive advantages. Therefore, a more interventionist approach might be desirable in certain circumstances.<sup>22</sup> However, the Post-Chicago School did not question the economic nature of antitrust law, the essential role played by efficiencies and the rule of reason method.

## 2. The Ordoliberalism

During the Nazi regime in Germany, some economists and lawyers created a circle of discussion at the Freiburg University.<sup>23</sup> The theories elaborated by the so-called Freiburg School became a current of thought named ‘Ordoliberalism’. They believed that free market was an essential feature of a democracy, although they distrusted also the ‘laissez-faire’ typical of the classical liberal thinking.<sup>24</sup> The first concern for Ordoliberals was the reconstruction of Germany after the Second World War. Moreover, their thought was focused more on “humanist values rather than efficiency or other purely economic concerns”.<sup>25</sup>

In the Ordoliberal thought, political freedom needed to be accompanied by economic freedom. Indeed, sharing the view of classic liberalism, Ordoliberals believed that in the absence of the latter, the former was endangered. However, in contrast with classic liberalism, they believe that not only public power but also private power should be limited. According to Eucken, the main representative of

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Hastings Law Journal, 1982, 34, p. 65 and May J., *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, Ohio State Law Journal, 1989, 50, p. 257.

<sup>21</sup> Hovenkamp H., *Antitrust Policy after Chicago*, cit., p. 242.

<sup>22</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., pp. 37-38. See also Jacobs M.S., *An Essay on the Normative Foundations of Antitrust Economics*, North Carolina Law Review, 1995/96, 74, pp. 219-225.

<sup>23</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 232.

<sup>24</sup> Ibid. p. 237.

<sup>25</sup> Ibid. p. 239. See also Behlke R., *Der Neoliberalismus und die Gestaltung der Wirtschaftsverfassung in der Bundesrepublik Deutschland*, Duncker & Humbolt, 1961, p. 38.

Ordoliberalism, “social security and social justice are the greatest concerns of our time”.<sup>26</sup> The economy was the tool through which it was possible to achieve these goals. Nonetheless, Ordoliberals thought that in order to do so the market needed to have certain characteristics. In particular, it was necessary to contrast economic power because it was an obstacle to social justice.<sup>27</sup>

Ordoliberals believed that the market could have the characteristics necessary to ensure social justice only if the economy was part of a more general political and legal context. This led Ordoliberals to develop the concept of economic constitution.<sup>28</sup> For Ordoliberals competition law was the main instrument to ensure the functioning of the market preventing its failures that were due, in their view, to the accumulation of market power. Their competition model was called “complete competition”, which was the situation where no firm has the power to coerce the behaviour of other firms.<sup>29</sup> This system composed of an economic constitution and competition rules could work thanks to the so called *Ordnungspolitik*. This was a specific policy that set out the instruction for a wise public intervention in the economy allowing the development of an industrialised economy within the boundaries of the rule of law.<sup>30</sup> Therefore, in the Ordoliberal view, economic, legal and political instruments were inextricably linked.

The Ordoliberal competition policy was mainly concerned with the control of monopolies.<sup>31</sup> According to Eucken the creation of monopolies could be prevented only if the market was not completely monopolised. Therefore, it was necessary, on the one hand, to set out rules to prevent the creation of new monopolies and, on the other, to govern existent monopolies in order to prevent the misuse of their economic power. Therefore, monopolies should be regulated in a manner that forces them to behave as they would do in a competitive market. Ordoliberals aimed to eliminate monopolies from the market, however they recognised that in some circumstances it was impossible, impractical or non-justified on economic basis.<sup>32</sup> They believed that in such cases firms that had strong market power should behave on the market *as if*

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<sup>26</sup> Eucken W., *Grundsätze der Wirtschaftspolitik*, Bern, 1952, p. 1.

<sup>27</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 241.

<sup>28</sup> Böhm F., *Wettbewerb und Monopolkampf*, Berlin: Heymann, 1933, p. 107.

<sup>29</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 245.

<sup>30</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 41.

<sup>31</sup> Ahlborn C. & Grave C., *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, Competition Policy International, 2006, 2(2), p. 203.

<sup>32</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 252.

they were subject to complete competition.<sup>33</sup> The *as if* test “required that firms not engage in conduct that would not be available to them if they did not have monopoly power”.<sup>34</sup> Böhm theorised two different types of competition: ‘performance competition’ and ‘impediment competition’.<sup>35</sup> Performance competition consisted in a conduct based on the improvement of products’ quality and reduction in prices. By contrast, the concept of impediment competition referred to a conduct that aimed to prevent competitors to perform.<sup>36</sup> Performance competition was the only conduct compatible with the model of complete competition. Any conduct that could exclude competitors from the market or obstruct their performance was considered as anticompetitive. Ordoliberals, indeed, focused their attention on the concept of economic freedom. In the Ordoliberal view, dominant firms had “an obligation not to impair its rivals’ freedom and right to compete”.<sup>37</sup> Impediment competition, indeed, would interfere with the competitive process creating distortions.

It is important to notice in conclusion that Ordoliberals did not see the Ordoliberal system as a container of general instructions that can help the interpreter in understanding economic and legal issues in specific cases. By contrast, this system was a constitutional legal order. It was an indivisible integrated mechanism that could work properly only if applied in its entirety.<sup>38</sup>

## CHAPTER 2

### 1. The Genesis of Article 102 TFEU

For many years European competition law<sup>39</sup> has been seen as an imitation of US antitrust law created during the occupation after the Second World War.<sup>40</sup> According to Gerber this view was wrong.<sup>41</sup> This author believed, instead, that EU competition law was the result of an indigenous process inspired by truly European currents of thinking. He argued that Ordoliberalism was the essential School of

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Böhm F., *Wettbewerb und Monopolkampf*, cit., 178.

<sup>36</sup> Ibid.

<sup>37</sup> Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 47.

<sup>38</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 256.

<sup>39</sup> Hereinafter also ‘EU competition law’.

<sup>40</sup> Ibid. p. 3.

<sup>41</sup> Ibid.

thought that constituted the pillar of competition law in Europe. This author often demonstrated this assumption by referring to the peculiar treatment applied in Europe to dominant positions. This view became soon majoritarian among scholars and now it is often taken for granted.<sup>42</sup> However, more recently, some authors contested this assumption, showing that Ordoliberalism was only one of the influences that contributed to shape EU competition law and, in particular, Article 102 TFEU.<sup>43</sup>

According to the prevailing view, the European concept of abuse of dominance has been developed on the basis of the Ordoliberal doctrine. This assumption is founded mainly on the determinant role played in the drafting of competition provisions by the German delegation, generally associated to the Ordoliberal thinking. Several examples have been given to demonstrate this assumption. It is maintained that many features of Article 102 TFEU would reflect Ordoliberal principles, for instances: (i) the finding of a dominant position is based mostly on market shares; (ii) the concept of ‘special responsibility’; (iii) the form-based and per se approach developed by the ECJ and (iv) the ban on both exclusionary and exploitative abuses.<sup>44</sup>

However, the analysis of the *travaux préparatoires* shows that Article 102 TFEU was not drafted as an Ordoliberal provision.<sup>45</sup> The drafters of the Spaak Report<sup>46</sup> were more concerned about the creation of a Common Market which allowed European countries to compete at international level.<sup>47</sup> The Common Market however was not seen as a panacea for all the economic issues of European countries. It was necessary to introduce a legal and economic framework that ensured “the most rational distribution of activities and the optimum rate of economic expansion”.<sup>48</sup> The drafters of the Spaak Report were focused on the need to develop a strong and

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<sup>42</sup> See *ex multis* Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit.; but also see Monti G., *Article 81 EC and Public Policy*, *Common Market Law Review*, 2002, 39, p. 1059-1060.

<sup>43</sup> See Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, *Oxford Journal of Legal Studies*, 2009, 29(2), pp. 267-303 and Schweitzer H., *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in Ehlermann C.D. & Marquis M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, 2008, pp. 119-163 and Ramirez Pérez S.M. & Scheur van de S., *The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]. Ordoliberalism and Keynesian Challenge*, in Patel K.K. & Schweitzer H. (eds.), *The Historical Foundations of EU Competition Law*, Oxford University Press, 2013, pp. 20-53.

<sup>44</sup> O'Donoghue R. & Padilla A.J., *The Law and Economics of Article 102 TFEU*, Hart Publishing, 2013, 2nd, p. 58.

<sup>45</sup> Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit., p. 270.

<sup>46</sup> Intergovernmental Committee of the Messina Conference, Reports by the Heads of Delegations to Foreign Ministers (hereinafter ‘Spaak Report’), 21 April 1956.

<sup>47</sup> Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit., pp. 278-279.

<sup>48</sup> *Ibid* p. 279, see the Spaak Report, cit., p. 10.

structured industry in Europe. In order to achieve this objective, the efficient management of resources within the Common Market was indispensable.<sup>49</sup> As far as monopolies were concerned, the Spaak Report seemed to suggest that the creation on monopolist power should be prevented.<sup>50</sup> Nonetheless, during the negotiations of the EC Treaty the conclusion reached was different. Indeed, the German proposal consisting in providing for a different treatment for cartels and dominant position prevailed. According to Germans, monopolies should not be considered as per se harmful of competition but only the abuse of dominant power should be prevented.<sup>51</sup> In this respect, it is also interesting to notice the opinion of von der Groeben, one of the authors of the Spaak Report and first Commissioner responsible for the competition directorate. He affirmed that unilateral conducts, which can exclude rival undertakings from the market, “*consist in not the restriction, but rather the strengthening of competition* and therefore are to be combated only when it is a matter of unfair competition. However, if rules applying to unfair competition are to be included in the Treaty, for systematic reasons, they should be separated from the rules on the maintenance of competition”.<sup>52</sup> This excerpt shows that the drafters did not conceive the abuse of dominant provision as a tool to protect competitors in the first place and, most remarkably, that they distinguished between the protection of competition structure or process and the protection of competitors. This finding is even more significant considering that this distinction was made by a German drafter who has always been associated to Ordoliberalism.<sup>53</sup> Thus, the assumption that the competition structure is founded on the participation of competitors in the competitive process as an exercise of the Ordoliberal economic freedom is questionable.<sup>54</sup>

Article 102 TFEU was then included in the EC Treaty and it is still part of the competition provisions after the Lisbon Treaty. Its formulation clearly reflects the German position about dominant positions. They are not forbidden per se. What is forbidden is only the abuse of the dominant position. Article 102 TFEU contains a list

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<sup>49</sup> Spaak Report, cit., p. 8.

<sup>50</sup> Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit., p. 281.

<sup>51</sup> Ibid. 284.

<sup>52</sup> von der Groeben H., Regierungskonferenz für den Gemeinsamen Markt und Euratom, Brüssel den 20. Oktober 1956 Mar. Com. 88, p. 5 (emphasis added). See Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit., p. 286

<sup>53</sup> Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit., p. 286.

<sup>54</sup> Eilmansberger T., *How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses*, *Common Market Law Review*, 2005, 42, pp. 129-133 and Schweitzer H., *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, cit., pp. 161-162.

of abusive practices. This list, however, is considered as illustrative and not exclusive.<sup>55</sup> Nonetheless, the list contained in Article 102 TFEU refers mainly to exploitative abuses, i.e. it seems directed to protect costumers of the dominant undertakings instead of their competitors. Since *Continental Can*<sup>56</sup> onwards, however, the ECJ has always considered Article 102 TFEU as applicable to exclusionary abuses and, in practice, this kind of abuses has constituted the first object of enforcement in the EU.

## 2. The Enforcement and the Goals of Article 102 TFEU

The first goal of Competition policy was the creation of the Common Market.<sup>57</sup> Ensuring that goods and services could freely flow within the common market required rules which “preclude private undertakings replacing the prohibited public obstacles to inter-state trade”.<sup>58</sup> In the first period of enforcement between the 1958 and 1973, the Commission, indeed, constantly referred to the necessity to protect the free circulation of goods, enhancing the integration of the market.<sup>59</sup> Moreover, according to Gerber, an integrated market was necessary also to allow European undertakings “to acquire sufficient size to compete effectively on world markets, and consumers would benefit from a Europe-sized market with its concomitant economies of scale”.<sup>60</sup> It is worth noticing that Gerber, the author who alleged the Ordoliberal foundations of EU competition law, emphasised in the previous excerpt that the EU was not scared about market power in the first years of enforcement. By contrast, the development of big and powerful firms with a European size would have promoted efficiencies and consumer welfare. Surprisingly, this analysis seems to assimilate the objectives of EU competition law enforcement in the first period to the Chicago theories. Indeed, according to Chicagoans concentrations and dominant positions could be efficient because of their ability to exploit economies of scale.<sup>61</sup> During the first decade, indeed, Article 102 TFEU was not enforced. The

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<sup>55</sup> See *ex multis* Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, para 37, where the Court held that the list of abusive practices contained in Article 102 TFEU is not exhaustive and the practices there mentioned are merely examples of abuses of dominant position.

<sup>56</sup> Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission*, [1975] ECR 495.

<sup>57</sup> Hawk B.E., *Antitrust in the EEC – The First Decade*, Fordham Law Review, 1972, 41, p. 229.

<sup>58</sup> Wesseling R., *The Modernisation of EC Antitrust Law*, Hart Publishing, 2000, p. 48.

<sup>59</sup> *Ibid.*

<sup>60</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 348.

<sup>61</sup> Chalmers D., Davies G. & Monti G., *European Union Law*, Cambridge University Press, 2014, 3rd, p. 947.

reason of this lack of enforcement is also explained by Gerber. He affirmed, indeed, that the “Commission policy was focused on the creation of business enterprises of sufficient size to compete with American corporations, and thus it had little incentive to apply legal provisions that might hamper the growth of European firms or reduce their ability to compete internationally”.<sup>62</sup> In that stage the Commission and the ECJ were mainly focused on vertical agreements.

Between the 1973 and 1985, competition rules were deployed to develop a European industrial policy.<sup>63</sup> During this period the ECJ adopted some of the fundamental decisions on Article 102 TFEU that contain some principles still applied nowadays. In *Commercial Solvents*<sup>64</sup> the Court stated that the exclusion of competitors could distort the structure of the market. Thus, the Court equated the protection of competitors to the protection of the market structure that, in this judgment, was considered as the goal of Article 102 TFEU. However, some years later, in *United Brands*<sup>65</sup> the Court held that the unilateral conducts were abusive because “they limit markets to the prejudice of consumers”.<sup>66</sup> Hence, the Court held that also the protection of consumers was a goal of Article 102 TFEU.<sup>67</sup>

The following period between the 1985 and the end of the 90s was characterised by a renewed focus on market integration. Indeed, the objective announced by the Commission on 1985 to achieve the single market by January 1<sup>st</sup>, 1993 was an overwhelming priority.<sup>68</sup> During this phase the first Merger Regulation<sup>69</sup> was introduced expanding the powers of the Commission. Moreover, the Commission, in a dialogue with the ECJ, started to adopt competition rules developing the legal framework. During the 90s, the attention gradually shifted on the need of market liberalisation. This new exigency, enshrined also in the Single European Act,<sup>70</sup> was due to the new international political situation that was dominated by neoliberal economic policies.<sup>71</sup> Competition law, thus, was deemed to have an essential role in

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<sup>62</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 356.

<sup>63</sup> Wesseling R., *The Modernisation of EC Antitrust Law*, Hart Publishing, 2000, p. 48.

<sup>64</sup> Joined Cases C-6/73 and C-7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corp. v Commission*, [1973] ECR 357.

<sup>65</sup> Case C-27/76, *United Brands v Commission*, [1978] ECR 207.

<sup>66</sup> *Ibid.* para 292.

<sup>67</sup> Gerber D.J., *Law and Competition in Twentieth Century Europe*, cit., p. 367.

<sup>68</sup> Wesseling R., *The Modernisation of EC Antitrust Law*, Hart Publishing, 2000, p. 49.

<sup>69</sup> Council Regulation (EEC) no. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, in OJ L 257/90 P 13.

<sup>70</sup> Single European Act, OJ L 169 of 29.6.1987

<sup>71</sup> Chalmers D., Davies G. & Monti G., *European Union Law*, cit., p. 953.

the liberalisation of the markets. Therefore, efficiencies and consumer welfare became part of the Commission's policy and enforcement.<sup>72</sup>

In the first years of the new millennium the competition legal framework has been largely reformed. In this period the approach of the Commission towards vertical and horizontal agreements changed. As it emerges from the Commission Regulations adopted in this period,<sup>73</sup> the Commission adopted a more economic approach which was focused on efficiencies and consumer welfare. The most clear example of this new approach is the fact that the Commission started to regard vertical agreements "as normally satisfying the conditions laid down in Article 101(3) of the Treaty".<sup>74</sup> Therefore, while in the first decade of enforcement vertical agreements were the first objective of competition enforcement, at the beginning of the new millennium they were considered as generally compatible with the Treaty. This new approach seems more similar to the Chicago School view rather than to the Ordoliberal thinking. Indeed, according to Chicagoans vertical agreements are almost always acceptable because of their efficiencies.<sup>75</sup> Also the Commission Regulation on co-operation agreements showed that there was a growing attention on innovation and consumer welfare, namely dynamic and allocative efficiencies. Some years later also mergers and acquisitions have been reformed with the adoption of the Council Regulation no. 139/04<sup>76</sup> and the Commission Guidelines on horizontal mergers.<sup>77</sup> Also in the field of concentrations, the approach developed by the Commission is based on a more economic analysis.

### **3. The Modernisation of Article 102 TFEU**

At the beginning of the new millennium, thus, the only unreformed sector of EU competition law was the abuse of dominant position. This lack of reform attracted many criticisms. One of the criticisms was that the enforcement of Article 102 TFEU was excessively formalistic and not based on a sound economic analysis. This

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<sup>72</sup> Ibid. pp. 953-954.

<sup>73</sup> Commission Regulation (EC) No 2659/2000 of 29 November 2000 OJ L 304, 05.12.2000; Commission Regulation (EC) No 2658/2000 of 29 November 2000 OJ L 304, 05.12.2000; Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements Official Journal C 3 of 06.01.2001. Commission Regulation (EC) No 2790/1999 of 22 December 1999 OJ L 336, 29.12.1999.

<sup>74</sup> Commission Regulation (EC) No 2790/1999, cit. p. 21.

<sup>75</sup> Amato G., *Antitrust and the Bounds of Power*, cit., p. 22.

<sup>76</sup> Council Regulation (EC) No. 139/2004 of January 2004 OJ L 24/1, 29.01.2004.

<sup>77</sup> Commission Guidelines (2004/C 31/03), OJ C 31/5, 05.02.2004.

situation created inconsistencies with the other sectors of EU competition law.<sup>78</sup> The Commission announced on 2003 that it would have modified its approach to Article 102 TFEU,<sup>79</sup> by making it more consistent with the economic analysis which underpinned the appraisal under Article 101 TFEU and EU merger control.<sup>80</sup> The reforming process was also strengthened by the creation on 2003 of the position and office of Chief Economist within DG Competition. This office played immediately a role in the modernisation of Article 102 TFEU.<sup>81</sup> It commissioned a report to the Economy Advisory Group on Competition Policy (EAGCP) to elaborate a more economic approach to Article 102 TFEU.<sup>82</sup> This report was characterised by some divergences with the ECJ's case law. In particular, the Report proposed, *inter alia*, (i) the adoption of an effect based approach, instead of a form based approach,<sup>83</sup> (ii) the protection of consumer welfare as the first objective of Article 102 TFEU<sup>84</sup> and (iii) the inclusion in the legal framework of the pro-competitive analysis of certain practices in order to ascertain whether there was an abuse or not.<sup>85</sup> On the basis of this Report and after a discussion with the National Competition Authorities, the Competition Directorate issued a Discussion Paper on exclusionary abuses.<sup>86</sup> Then, after extensive consultations, on 2008 the content of the Discussion Paper was translated into the Guidance.<sup>87</sup> This document has a peculiar legal status. It is a non-binding act that differs also from the Guidelines issued by the Commission regarding the application of Article 101 TFEU and the EU merger control law. As it is specified at paragraphs 2 and 3 of the Guidance, it is a document that illustrates the exclusionary conducts that the Commission considers as priorities and those that, by contrast, are more likely to be considered as non-dangerous.

In the Guidance the Commission states that the focus of its enforcement will

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<sup>78</sup> Vickers J., *Speech to the 31th Conference of the European Association for Research in Industrial Economics*, Berlin, 3 September 2004; Sher B., *The Last of the Steam-Powered Trains: Modernising Article 82*, *European Competition Law Review*, 2004, 25(5), pp. 243-246.

<sup>79</sup> Lowe P., *Speech at the 30th Annual Conference on International Antitrust Law and Policy*, Fordham Corporate Law Institute, 23 October 2003. O'Donoghue R. & Padilla A.J., *The Law and Economics of Article 102 TFEU*, cit., p. 70.

<sup>80</sup> *Ibid.* p. 71

<sup>81</sup> *Ibid.*

<sup>82</sup> Report by the Economic Advisory Group on Competition Policy, *An Economic Approach to Article 82*, July, 2005.

<sup>83</sup> *Ibid.* p. 6.

<sup>84</sup> *Ibid.* pp. 8-9.

<sup>85</sup> *Ibid.* pp. 30-53.

<sup>86</sup> DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December 2005.

<sup>87</sup> Guidance on the Commission's enforcement priorities, cit.

regard those practices that cause most harm to consumers.<sup>88</sup> One of the most significant elements introduced by the Guidance paper is the AEC test for pricing abuses. The Commission points out at paragraph 23 of the Guidance that “vigorous price competition is generally beneficial to consumers”. Therefore the Commission will intervene only where the price based conduct is likely to create an ‘anticompetitive foreclosure’, this is to say when the conduct can exclude from the market a competitor which is ‘as efficient as the dominant undertaking’. This test has been used by the Court with respect predatory pricing in *Akzo*,<sup>89</sup> where it held that “such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”.<sup>90</sup> The cost benchmark adopted by the Commission is different from the one deployed by the Court in *Akzo*. Indeed, while the Court considered abusive prices below average total costs (ATC), the Commission prefers to rely upon average avoidable costs (AAC) and long-run average incremental costs (LRAIC).<sup>91</sup> When the dominant undertaking applies prices below AAC it is scarifying profits and, therefore, as efficient competitors cannot compete without incurring a loss.<sup>92</sup> When the prices applied are below LRAIC, instead, the dominant undertaking is not recovering all the fixed costs of producing a good or a service. Thus, in this case there is only the possibility that an equally efficient competitor is driven out from the market.<sup>93</sup>

The Commission states that rebates are discounts granted to costumers to reward them when their purchases over a defined reference period exceed a certain threshold.<sup>94</sup> Rebates are a common commercial practice that can have pro-competitive effects, such as the stimulation of demand and benefits for consumers.<sup>95</sup> However, sometimes they can have harmful effects. The Commission distinguishes between individualised and standardised rebates.<sup>96</sup> Individualised rebates are more dangerous. In fact, they allow the dominant undertaking to set the rebates at a level which is determined on the specific features of the single costumer, making for the latter more

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<sup>88</sup> See para 5 of the Guidance.

<sup>89</sup> Case C-62/86 *Akzo Chemie v Commission* [1991] ECR I-3359

<sup>90</sup> *Ibid.* para 72.

<sup>91</sup> Para 26 of the Guidance.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Para 37 of the Guidance.

<sup>95</sup> *Ibid.*

<sup>96</sup> Para 45 of the Guidance.

difficult to switch and thereby increasing the loyalty enhancing effect.<sup>97</sup> The Commission distinguishes, also, between retroactive and incremental rebates. The former are rebates that apply to all the purchases of the costumers over a relevant period of time once the threshold has been met. Incremental rebates, instead, apply only to the quota of purchases that exceed the threshold.<sup>98</sup> The Commission considers retroactive rebates more harmful because they have a stronger loyalty enhancing effect.<sup>99</sup>

By means of the AEC test the Commission investigates whether rebates hinder the expansion or entry of efficient competitors, limiting their ability to supply part of the demand of individual costumers.<sup>100</sup> In particular, the Commission establishes what is the relevant range, this is to say the offer that competitors have to make to costumers in order to compensate them for the loss of the rebate if they switch part of their demand away from the dominant firm. Competitors have not to meet the average cost of the dominant undertaking but the effective price, which is the list price minus the rebate calculated over the relevant range of sales and the relevant period of time. For incremental rebates the relevant range is the part of purchase that exceeds the threshold and that makes possible the grant of the rebate. For retroactive rebates, instead, the Commission will determine the relevant range by verifying the ‘contestable share’, i.d. the part of the costumers’ purchase that can be realistically switched away from the dominant firm.<sup>101</sup> The Commission attributes to the contestable share the whole discount granted and it establishes whether the effective price on that part is below the dominant undertaking’s costs.<sup>102</sup> The lower the effective price is compared to the average price of the dominant firm, the stronger the loyalty-enhancing effect.<sup>103</sup> However, where the effective price is constantly above LRAIC of the dominant firm, it is usually considered not capable of foreclosing equally efficient competitors. By contrast, where the effective price is below AAC, it is usually considered capable to cause an anticompetitive foreclosure.<sup>104</sup> Where the effective price is between AAC and LRAIC the Commission will examine other

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid. para 37.

<sup>99</sup> Ibid. para 40.

<sup>100</sup> Ibid. para 41.

<sup>101</sup> Ibid. para 42.

<sup>102</sup> Geradin D., *Loyalty Rebates after Intel: Time for the European Court of Justice to Overrule Hoffmann-La Roche*, cit.

<sup>103</sup> Para 43 of the Guidance.

<sup>104</sup> Para 44 of the Guidance.

relevant economic factors, such as possible counterstrategies available to competitors.<sup>105</sup> By taking into account the contestable share and adopting the list price less the discount as a benchmark, the Commission considers in the analysis the fact that competitors of the dominant undertakings cannot benefit from the economies of scale that are enjoyed by the dominant firm. Therefore, the Commission intends to protect competitors that are equally efficient only for the contestable share. Thus, the test deployed for retroactive rebates by the Commission protect competitors that are (almost) as-efficient as the dominant undertaking. Considering the whole demand they would be less efficient because of the lack (or the less extent) of economies of scale.<sup>106</sup>

## CHAPTER 3

### 1. The Jurisprudence of the ECJ

*Hoffman-La Roche*<sup>107</sup> is the seminal case on rebates. In this decision the Court identified the distinction between pure quantitative rebates and exclusivity or quasi exclusivity rebates. In particular, the Commission found that the dominant firm concluded with several purchasers agreements which granted rebates if they bought all or most of their requirements exclusively or in preference from it. In this judgement, the Court stated that this kind of rebates<sup>108</sup> is unlawful. Exclusivity rebates, indeed, “are not based on an economic transaction which justifies this burden or benefit but 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”.<sup>109</sup> Therefore, exclusivity rebates, unlike quantity rebates exclusively linked with the volume of purchases, are designed to prevent customers from obtaining their supplies from competing producers.<sup>110</sup> Moreover, exclusivity rebates have also a discriminatory effect, because they result in the application of dissimilar conditions to equivalent

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<sup>105</sup> Ibid.

<sup>106</sup> O'Donoghue R. & Padilla A.J., *The Law and Economics of Article 102 TFEU*, cit., p. 79.

<sup>107</sup> Case C-85/76, *Hoffmann – La Roche & Co. AG v. Commission* [1979] ECR. 461 (hereinafter ‘*Hoffmann-La Roche*’).

<sup>108</sup> Ibid. para 89.

<sup>109</sup> Ibid. para 90.

<sup>110</sup> Ibid.

transactions with other trading parties.<sup>111</sup> Then, the Court stated that “the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to *influence the structure of a market* where, as a result of the very presence of the undertaking in question, the degree of competition is 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”.<sup>112</sup>

The first judgment in which the Court identified a third category of rebates is *Michelin I*.<sup>113</sup> In this case Michelin was fined by the Commission because it granted selective discounts on an individual basis conditional upon sales "targets". According to the Court, this rebates scheme was not a quantitative discount because Michelin had set the rebate on the basis of individual targets. However, the Court acknowledged that there was no exclusivity clause. Therefore, it held that non-exclusivity rebates must be assessed in the light of all the circumstances. In particular, in these cases it must be considered “the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition”.<sup>114</sup> The discount system in question was based on an annual reference period. According to the Court this period was long enough to have “the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period”.<sup>115</sup> By doing so, Michelin abused its dominant position restricting the freedom of choice of costumers and, therefore, the access to the market to other producers.<sup>116</sup>

Then, in *Michelin II* the General Court (hereinafter ‘GC’) examined a new

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid. para 91 (emphasis added).

<sup>113</sup> Case C-322/81, *Nederlandsche Banden-Industrie-Michelin v. Commission* [1983] ECR 3461 (hereinafter ‘*Michelin I*’).

<sup>114</sup> Ibid. para 73.

<sup>115</sup> Ibid. para 81.

<sup>116</sup> Ibid. para 85.

form of third category rebates scheme.<sup>117</sup> In particular, Michelin implemented a rebates scheme that provided for an annual refund which applied retroactively to all the purchases made by its costumers on the reference period. Declaring this scheme incompatible with Article 102 TFEU, the GC held that retroactive rebates have a stronger loyalty inducing effect than incremental rebates.<sup>118</sup> Furthermore, the GC stated that, for the application of Article 102 TFEU, “*establishing the anti-competitive object and the anti-competitive effect are one and the same thing*”.<sup>119</sup>

In *British Airways*<sup>120</sup> the Court assessed a third category rebates scheme that, similar to the one in *Michelin I*, provided for individualised rebates. This judgement is interesting because the Court, trying to explain how the loyalty-inducing effect works, introduced the concept of ‘unavoidable business partner’. In particular, the Court stated that “by reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an *unavoidable business partner* in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, *even over more generous offers of its competitors*. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, *those competitors would have to offer them significantly higher rates of discount or bonus*”.<sup>121</sup>

*Tomra*<sup>122</sup> was the first case after the adoption of the Commission’s Guidance,<sup>123</sup> but the Court, deciding on the appeal of the GC’s decision, expressly confirmed that the Guidance had no relevance because it was adopted after the Commission’s decision.<sup>124</sup> This decision is relevant for two reasons. First, because the GC for the first time excluded that under Article 102 TFEU there is a *de minimis* threshold. Second, because it rejected also the relevance of a cost analysis for rebates. Since it was a third category rebates scheme, it was necessary to consider all the circumstances. In particular, a retroactive and individualised rebates scheme was at

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<sup>117</sup> Case T-203/01, *Manufacture Française des Pneumatiques Michelin v. Commission*, 2003, E.C.R. II-4071 (hereinafter ‘*Michelin II*’).

<sup>118</sup> *Ibid.* para. 85.

<sup>119</sup> *Ibid.* para. 241 (emphasis added).

<sup>120</sup> Case C-95/04, *British Airways plc v Commission*, [2007] ECR I-2331 (hereinafter ‘*British Airways*’).

<sup>121</sup> *Ibid.* para 75 (emphasis added).

<sup>122</sup> Case T-155/06, *Tomra System ASA v Commission*, [1995] ECR I-865 (hereinafter ‘*Tomra*’).

<sup>123</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02

<sup>124</sup> Case C-549/10 P, *Tomra System ASA v Commission*, [2012] not published para 52.

stake. The GC held that any degree of foreclosure is abusive. Indeed, “the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors” because “the costumers on the foreclosed part of the market should have the opportunity to benefit *from whatever degree of competition is possible* on the market and *competitors should be able to compete on the merits for the entire market and not just for part of it*”.<sup>125</sup> Moreover, according to the GC the exclusionary effect of retroactive rebates does not require the dominant undertaking to sacrifice profits. Indeed, “if retroactive rebates are given, the average price obtained by the dominant undertaking may well be far above cost and ensure a high average profit margin. However, retroactive rebate schemes ensure that, from the point of view of the customer, the effective price for the last units is very low because of the suction effect”.<sup>126</sup> The Court of Justice confirmed this finding on appeal.<sup>127</sup>

More recently, in *Intel*<sup>128</sup> the GC dealt again with exclusivity rebates, reaffirming the distinction between three categories.

First, the so-called ‘quantity rebates’ that are based solely on the volume of purchase. In this case, the dominant undertaking passes on its costumers the cost savings generated by the higher volume of purchase. This type of rebates is considered presumptively lawful.<sup>129</sup>

Second, the so-called ‘exclusivity or quasi-exclusivity rebates’ that are rebate schemes conditioned on the costumers’ purchasing all or most of its requirements from the dominant firm. This type of rebates is considered presumptively unlawful unless objectively justified.<sup>130</sup>

Third, all the different types of rebates that are neither quantity nor exclusive rebates but which can have a loyalty inducing effect. In this case, to ascertain the legality of these rebates an investigation of all the circumstances is required.<sup>131</sup> However, there is no need to establish that there has been an actual foreclosure of the market, or to apply the AEC test<sup>132</sup> and there is no *de minimis* threshold.<sup>133</sup>

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<sup>125</sup> Case T-155/06, *Tomra*, cit. para. 241 (emphasis added).

<sup>126</sup> *Ibid.* para 267.

<sup>127</sup> Case C-549/10 P, *Tomra Systems and Others v. Commission*, cit., para. 56.

<sup>128</sup> Case T-286/09, *Intel*, 2014, cit.

<sup>129</sup> *Ibid.* para. 75.

<sup>130</sup> *Ibid.* paras. 76-77.

<sup>131</sup> *Ibid.* para. 78.

<sup>132</sup> *Ibid.* para. 103.

<sup>133</sup> *Ibid.* paras. 116 and 119.

In *Intel* the GC held, *inter alia*, that “the possible smallness of the parts of the market which are concerned by the practices at issue is not relevant”, since the structure of competition has already been weakened by the presence of a dominant undertaking, any further weakening may constitute an abuse.<sup>134</sup> Moreover, “the grant of an exclusivity rebate by an unavoidable trading partner *makes it structurally more difficult for a competitor to submit an offer at an attractive price* and gain access to the market” because that “grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of demand of the customer as a leverage to secure also the contestable share”.<sup>135</sup> In addition, there is no need to prove the causal link between the rebate scheme and actual effects on the market<sup>136</sup> or that some effects have been produced. Furthermore, the GC, quoting *Tomra*,<sup>137</sup> made clear that the anti-competitive effects does not require a rebates system that forces an as-efficient competitor to charge ‘negative’ prices, i.d. prices lower than costs. Indeed, in order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty-inducing mechanism.<sup>138</sup> In the GC’s view, indeed, “an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult”.<sup>139</sup> The GC, then, specified that rebates cannot be subject to the same test of margin squeeze<sup>140</sup> or predatory pricing,<sup>141</sup> because in these cases it is impossible to assess whether a price is abusive without comparing it with other prices and costs. A price cannot be considered unlawful in itself. By contrast, regarding exclusivity rebates, “it is the condition of exclusive or quasi-exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive”.<sup>142</sup> Furthermore, since it is not essential to carry out the AEC test for third category rebates, it is not necessary to do so with respect to exclusive rebates.<sup>143</sup>

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<sup>134</sup> Ibid. para. 116.

<sup>135</sup> Ibid. para. 93.

<sup>136</sup> Ibid. para. 104 (emphasis added).

<sup>137</sup> Case C-549/10 P, *Tomra Systems and Others v. Commission*, cit. para 73.

<sup>138</sup> Case T-286/09, *Intel*, cit., para 145.

<sup>139</sup> Ibid. para 150.

<sup>140</sup> See Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527 (hereinafter ‘*TeliaSonera*’) and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555.

<sup>141</sup> Case C-209/10 *Post Danmark A/S v Konkurrenserådet* [2012] ECLI:EU:C:2012:172 (hereinafter ‘*PostDanmark I*’).

<sup>142</sup> Case T-286/09, *Intel*, cit., para 152.

<sup>143</sup> Ibid. para 153.

In the recent judgment *Post Danmark II*<sup>144</sup> the Court dealt again with the third category rebates. In this case a standardised (i.d. not individualised) retroactive rebates scheme was at issue. The Court noted that since the rebate was retroactive, “relatively modest variations in sales of the products of the dominant undertaking have disproportionate effects on co-contractors”.<sup>145</sup> In addition, the Court pointed out that, since the scheme was based on a reference period of one year, “it had the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period”.<sup>146</sup> Such a rebate scheme enabled the dominant undertaking to tie its own customers to itself and attract the customers of its competitors. By doing so, *Post Danmark* was able to secure the suction to itself of the part of demand subject to competition on the relevant market.<sup>147</sup> Particularly significant is also the fact that the Court, citing *British Airways*, held that “an undertaking which has a very large market share is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which secures for it freedom of action. In those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts based on overall sales volume”.<sup>148</sup> Thus, retroactive and standardised rebates, based on reference period of one year, produce an exclusionary effect. Therefore, they are abusive. Moreover, according to the Court, “the fact that [the rebate] covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect”.<sup>149</sup> The Court stated also that where the dominant undertaking hold a high market share “applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient

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<sup>144</sup> Case C-23/14, *Post Danmark II*, cit. For a comment on this recent judgement see Chan, S.S.H., *Post Danmark II: Per Se Unlawfulness Of Retroactive Rebates Granted By Dominant Undertakings*, *European Competition Law Review*, 2016, 37(2), p. 43; Ibáñez Colomo P., *Post Danmark II: The Emergence of a Distinct ‘Effects- Based’ Approach to Article 102 TFEU*, *Journal of European Competition Law & Practice*, 2016, 7(2), p. 113; Ibáñez Colomo P., *Post Danmark II, or the Quest or Administrability and Coherence in Article 102 TFEU*, *LSE Law, Society and Economy Working Papers* 15/2015 available at [www.lse.ac.uk/collections/law/wps/wps.htm](http://www.lse.ac.uk/collections/law/wps/wps.htm) and Lundqvist B., *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?* *European Competition Journal*, 2015, 11(2-3), p. 557.

<sup>145</sup> Case C-23/14, *Post Danmark II*, cit. para 33.

<sup>146</sup> *Ibid.* para 34.

<sup>147</sup> *Ibid.* para 35.

<sup>148</sup> *Ibid.* para. 40.

<sup>149</sup> *Ibid.* para. 46.

competitor practically impossible”.<sup>150</sup> However, according to the Court, the AEC test is one of the tools to assess whether there is an abuse of a dominant position in the context of a rebate scheme.<sup>151</sup>

In *Post Danmark II* the Court was also asked to ascertain whether the anti-competitive effect of a rebate scheme must be, on the one hand, probable and, on the other, serious or appreciable. As regards the likelihood, the Court held that the anti-competitive effect of a particular practice must not be of a purely hypothetical nature.<sup>152</sup> The Court pointed out that a practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete. Quoting its decision in *TeliaSonera*,<sup>153</sup> the Court stated that “it is sufficient to demonstrate that there is an anti-competitive effect which may potentially *exclude competitors who are at least as efficient as the dominant undertaking*”.<sup>154</sup> Then the Court, quoting *Post Danmark I*,<sup>155</sup> specified that the assessment of third category rebates, which must be carried out in the light of all relevant circumstances, aims to determine “whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, *to the detriment of competition and, thereby, of consumers’ interests*”.<sup>156</sup> As regards the appreciability of the anticompetitive effect, the Court held that “fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates”.<sup>157</sup> Accordingly, the anti-competitive effect of a rebate scheme must be probable but not of serious or appreciable nature.<sup>158</sup>

## 2. The Inconsistency of the ECJ’s Approach

The ECJ’s approach towards rebates has been criticised by many scholars and practitioners<sup>159</sup> because of its excessive formalism, lack of sound economic basis and

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<sup>150</sup> Ibid. para 59.

<sup>151</sup> Ibid. para 61.

<sup>152</sup> Ibid. para 65.

<sup>153</sup> Case C-52/09, *TeliaSonera*, cit., see para 64.

<sup>154</sup> Case C-23/14, *Post Danmark II*, cit., para 66 (emphasis added).

<sup>155</sup> Case C-209/10, *Post Danmark I*, cit., see para 44.

<sup>156</sup> Case C-23/14, *Post Danmark II*, cit., para 69 (emphasis added).

<sup>157</sup> Ibid. para 73.

<sup>158</sup> Ibid. para 74.

<sup>159</sup> See n. 1

inconsistencies. Although some scholars argued in favour of the ECJ's decisions,<sup>160</sup> the majority of economists and lawyers firmly ask for a new and more economic approach on rebates. In the jurisprudence examined in the previous paragraph, the ECJ takes position on the three different categories of rebates and also, in general, on the concept of abuse of dominant position. This latter aspect will be firstly examined. Then, the analysis will focus on the various categories of rebates and in particular on exclusivity or quasi-exclusivity as well as third category rebates. Finally, the approach of the Court will be examined from a more general perspective.

As regards the general concept of abuse of dominance there are several inconsistencies that must be noted. First and foremost, in the *Hofmann La Roche* line of cases the ECJ has always interpreted the concept of abuse in a formalistic way and it is hard to distinguish lawful methods of competition from unlawful ones. The main example of this kind of reasoning is represented by the decision in *Intel*. In this decision the GC, rejecting the need to prove the likelihood of the effect, the use of the AEC test and a *de minimis* threshold, considered abusive any conduct that drives from the market whatever competitor, even a non efficient small one. This approach cannot be reconciled with the one of *Post Danmark I*, where the Grand Chamber of the Court made clear that Article 102 TFEU “does that [not] seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market”.<sup>161</sup> Indeed, “not every exclusionary effect is necessarily detrimental to competition”.<sup>162</sup> It is obvious that the two approaches are in contrast. They reflect a different understanding of the meaning of “special responsibility” and they aim to protect different goals, namely individual economic freedom on the one hand and efficiencies as well as consumers on the other.

Second, in *Michelin II* the GC stated that with respect to abuse of dominance there would be no distinction between restrictions by object or by effect, and thus the Commission should be never required to prove them.<sup>163</sup> This finding has been confirmed in *Intel*, but it is at odds with the decision in *Post Danmark I* where the Grand Chamber of the Court held that “in order to assess the existence of anti-

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<sup>160</sup> Wils P.J.W., *The Judgement of the EU General Court in Intel and the So-called More Economic Approach to Abuse of Dominance*, *World Competition*, 2014, 37, p.405 and Whish R., *Intel v Commission: Keep Calm and Carry On!*, *Journal of European Competition Law & Practice*, 2015, 6, p. 1.

<sup>161</sup> Case C-209/10 *Post Danmark I*, cit. para 21 (emphasis added). See also Case C-208/08 *Deutsche Telekom*, cit., para 177.

<sup>162</sup> *Ibid.* para 22 and Case C-52/09 *TeliaSonera*, cit., para 43 (emphasis added).

<sup>163</sup> Case T-203/01, *Michelin II*, cit. para 241.

competitive effects [...] it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests".<sup>164</sup> Since only restrictions by effect need to be proven,<sup>165</sup> the abovementioned decisions are in contrast.

Third, in *Tomra* and in *Intel* the GC stated that under Article 102 TFEU there is no *de minimis* threshold.<sup>166</sup> Even if this finding has been confirmed by the Court in *Post Danmark II*,<sup>167</sup> it seems in contrast with the decision in *Van den Bergh Foods*<sup>168</sup> where the GC held that "it cannot be inferred with certainty from the sole fact that the identified part of the [dominant undertaking] network of agreements involved around 40% of all sales outlets in the market, that that part is automatically capable of preventing, restricting or distorting competition appreciably. That implies [...] that 60%, therefore a majority, of sales outlets in the relevant market are not foreclosed as result of the exclusivity clause".<sup>169</sup> It is clear that if every restriction caused by the dominant undertaking constitutes an abuse, even a foreclosure of a very small part of the market, it would not make any sense to consider that the majority of the market is not foreclosed in order to establish whether there is an abuse or not. It is worth noticing that in *Intel* the GC considered sufficient a foreclosure of 14% of the market.<sup>170</sup>

Fourth, in *Michelin I* and *Michelin II* the Court and the GC held that the dominant undertaking "has a special responsibility, *irrespective of the causes of that position*".<sup>171</sup> By contrast, the Grand Chamber of the Court in *Post Danmark I* stated that "when the existence of a dominant position has its origins in a former legal monopoly, *that fact has to be taken into account*".<sup>172</sup>

With specific respect to the category of exclusivity and quasi-exclusivity rebates some inconsistency can be observed. In *Intel* the GC held that a restrictive

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<sup>164</sup> Case C-209/10 *Post Danmark I*, cit. para 44.

<sup>165</sup> Case C-67/13 P *Groupement des Cartes Bancaires (CB) v Commission* [2014] ECLI:EU:C:2014:2204 (not yet published), para 58.

<sup>166</sup> Case T-155/06, *Tomra*, cit. para. 241 and Case T-286/09, *Intel*, cit., paras 116 and 119.

<sup>167</sup> Case C-23/14, *Post Danmark II*, cit., para 73.

<sup>168</sup> Case T-65/98, *Van den Bergh Foods Ltd v Commission*, [2003] ECR II-04653 confirmed in appeal C-552/03 P *Unilever Bestfoods v Commission* ECR [2006] I-09091

<sup>169</sup> *Ibid.* para 108.

<sup>170</sup> Case T-286/09, *Intel*, cit., para 194.

<sup>171</sup> Case T-203/01, *Michelin II*, cit., para 55 and Case C-322/81, *Michelin I*, cit., para 57. See also Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 112.

<sup>172</sup> Case C-209/10 *Post Danmark I*, cit., para 23 (emphasis added).

effect is inherent in exclusivity rebates<sup>173</sup> and that “even a positive AEC test result would not be capable of ruling out the potential foreclosure effect which is inherent in the [exclusivity rebates]”.<sup>174</sup> Moreover, even if it is proven that there is no causal link between the grant of exclusivity rebates and customer’s decision to use the dominant firm as its exclusive supplier, “that would not call in question the inherent capability of [...] rebates to restrict competition”.<sup>175</sup> Therefore, exclusivity rebates are by their “very nature capable of making access to the market more difficult for [...] competitors”.<sup>176</sup> According to the GC, thus, although exclusivity conditions may, in principle, have beneficial effects for competition when they are granted by a dominant undertaking they are unlawful because competition is already restricted by the presence of the dominant firm.<sup>177</sup> Notwithstanding this per se approach<sup>178</sup> that rejects any relevance of the AEC test the GC justifies this reasoning, as it already did in *British Airways*,<sup>179</sup> on the leveraging theory which underpins the AEC test elaborated in *Akzo*<sup>180</sup> and developed by the Commission in the Guidance.<sup>181</sup> This reasoning of the GC is somehow paradoxical.<sup>182</sup> The GC, indeed, first treats exclusivity rebates as per se illegal because they inherently restrict competition and on this basis it refuses to use the AEC test. Then it explains the reason of their inherent anticompetitive nature relying upon the logic of the AEC test that aims to verify the effects of the conduct at issue.

As far as the third category rebates is concerned, the recent decision in *Post Danmark II* is particularly relevant and it shows some ambiguities and inconsistencies. The third category comprehends those quantitative rebates that cannot be considered presumptively legal because of their particular features that render them loyalty inducing. In particular, since *Michelin I* onwards the ECJ specified that when rebates are retroactive and/or individualised and based on a reference period of one year they

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<sup>173</sup> Case T-286/09, *Intel*, cit., para 86.

<sup>174</sup> *Ibid.* para 151.

<sup>175</sup> *Ibid.* para 545.

<sup>176</sup> *Ibid.* para 88.

<sup>177</sup> *Ibid.* para 89. On the pro competitive effects of exclusivity see Case C-234/89 *Delimitis* [1991] ECR I-935, paras 14 to 27.

<sup>178</sup> Or quasi per se approach, since the Court leaves room, at least in theory, for objective justifications.

<sup>179</sup> Case C-95/04, *British Airways*, cit., para 175.

<sup>180</sup> Case C-62/86 *Akzo Chemie v Commission*, cit., para 72.

<sup>181</sup> Case T-286/09, *Intel*, cit., para 93.

<sup>182</sup> Geradin D., *Loyalty Rebates after Intel*, cit., p. 602; Ahlborn, C. & Piccinin, D., *The Intel Judgement and Consumer Welfare*, cit., p. 69 and Venit J.S., *Case T-286/09 Intel v Commission*, cit., p. 212.

have a loyalty inducing effect. In these cases, the Court analyses all the circumstances in order to ascertain whether or not there is a potential exclusionary effect. However, the appraisal of these circumstances is purely formalistic. When the ECJ establishes that the rebates scheme is retroactive or individualised, the scheme is considered presumptively abusive unless objectively justified. This approach has been confirmed by the Court in *Post Danmark II*. Nevertheless, this judgment introduces more ambiguity than clarity in the assessment.

First, in fact, the Court stated that the AEC test is a tool among others in the appraisal of the abuse when this type of rebate is in question.<sup>183</sup> Moreover, establishing that the exclusionary effect must be likely, the Court states that the probable exclusionary effect must exclude competitors at least as efficient as the dominant undertaking.<sup>184</sup> Nonetheless, the Court does not take this test in any consideration when it evaluates the conduct of *Post Danmark*. The Court, in fact, relies upon only the qualitative elements already deployed in its previous case law,<sup>185</sup> namely the retroactive nature of the rebate,<sup>186</sup> the one year reference period,<sup>187</sup> the application of the rebates to both the contestable and non-contestable portions of demand,<sup>188</sup> the strength of the dominant position,<sup>189</sup> and the limited degree of competition in the market due to the presence of the dominant undertaking.<sup>190</sup> Therefore, the Court acknowledges that the AEC test is part of the appraisal and that the likely effect must exclude an as efficient competitor. However, it does not apply this test at all in order to establish whether there is a potential anticompetitive effect.

Second, the Court stated that “the fact that the rebates [...] concern a large proportion of customers [...] does not, in itself, constitute evidence of abusive conduct”.<sup>191</sup> However, the Court then held that “the fact that a rebate scheme [...] covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, *which may bear out the likelihood of an anti-competitive exclusionary effect*”.<sup>192</sup> The inconsistency of these

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<sup>183</sup> Case C-23/14, *Post Danmark II*, cit., para 61.

<sup>184</sup> *Ibid.* para 66.

<sup>185</sup> See Venit J.S., *Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning*, *Journal of European Competition Law & Practice*, 2016, p. 8.

<sup>186</sup> Case C-23/14, *Post Danmark II*, cit., paras 32-33.

<sup>187</sup> *Ibid.* para 34.

<sup>188</sup> *Ibid.* para 35.

<sup>189</sup> *Ibid.* para 39.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* para 44.

<sup>192</sup> *Ibid.* para 46 (emphasis added).

findings is clear.<sup>193</sup> Indeed, *tertium non datur*: or the number of costumers tied is irrelevant to prove the abusive conduct or it is an useful indication that can even bear out the likelihood of the anticompetitive effect. However, the Court did not use the element at issue in the analysis. Therefore, *de facto* the Court does not consider the number of costumers tied as a relevant element.

Third, in *Post Danmark II* the Second Chamber of the Court expressly contradicts the Grand Chamber's decision in *Post Danmark I*. Indeed, in the latter judgement the Court stated that price discrimination in itself cannot constitute an exclusionary abuse.<sup>194</sup> By contrast, in *Post Danmark II*, the Court held that a rebates scheme is unlawful also when it “tends [...] to apply dissimilar conditions to equivalent transactions with other trading parties”.<sup>195</sup>

It is now necessary to turn on the general approach of the ECJ towards rebates that reveals some inconsistencies. In particular, there are two types of contradictions: (i) a logic contradiction with respect to the usefulness and suitability of the distinction in three forms of rebates and (ii) a substantive contradiction with Article 102 TFEU.

Firstly, the ECJ considers pure quantitative rebates presumptively lawful because they are linked only to the efficiencies generated by the rebate scheme. Indeed, they correspond to the cost savings due to the volume of purchases made by costumers from the dominant undertaking. Therefore, the test applied by the ECJ in this case is purely economic. By contrast, when the ECJ assesses the second and third category of rebates, it does not take into account economic data and it finds its analysis only on formalistic elements. It seems that there is no reason to apply different tests to analyse these rebates schemes. Indeed, the third category rebates are quantitative rebates with additional features that eliminate the presumption of legality. Hence, they should be analysed in the same manner of pure quantitative rebates. Furthermore, even if exclusivity rebates are different because of the exclusivity or quasi-exclusivity clause, it seems that this distinction does not correspond to the practice. Indeed, in *Intel* the GC considered the rebate scheme as exclusive even if there was not exclusivity clause.<sup>196</sup> The GC, indeed, inferred the exclusivity from the behaviour of the undertakings involved, in particular, from the quantity of goods purchased. Thus, at least when there is no contractual obligation, the test should be

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<sup>193</sup> Venit J.S., *Making Sense of Post Danmark I and II*, cit.

<sup>194</sup> Case C-209/10 *Post Danmark I*, cit., para 30.

<sup>195</sup> Case C-23/14, *Post Danmark II*, cit., para 64.

<sup>196</sup> Case T-286/09, *Intel*, cit., para 104.

the same also for exclusivity rebates. The difference in the tests applied by the ECJ seems to result in an inconsistent outcome. Indeed, in both second and third categories of rebates the ECJ does not deploy the AEC test and affirmed that there is no *de minimis* threshold. Therefore even a potential foreclosure of a small part of the market which may exclude or make difficult the access for a non-efficient competitor is an abuse of dominance. However, from an economic perspective the effect produced by pure quantitative rebates can be exactly the same. Indeed, pure quantitative rebates granted by a strong dominant undertaking that enjoys a great economy of scale can result in a significant discount that limits the freedom of choice of costumers creating a loyalty inducing effect. The loyalty inducing effect, in fact, as it is pointed out in *British Airways* and *Intel*, is due to the fact that competitors cannot meet the offer of the dominant undertaking. Therefore, the ECJ should apply the same test to all the three categories of rebates. A distinction based on the form of the rebates scheme does not have any relation with the economic rationale of the scheme.

Secondly, and more importantly, the approach of the ECJ towards rebates seems at odds with Article 102 TFEU to the extent that this provision does not prohibit dominant position in itself but only the abuse of that.<sup>197</sup> The dominant firm has “a special responsibility not to allow its conduct to impair undistorted competition on the internal market”.<sup>198</sup> Therefore, the dominant undertakings have special obligations that prevent them from reducing the level of competition that is already weakened by their presence.<sup>199</sup> Nonetheless, in *Hoffmann La Roche* the Court stated that the dominant firm can use methods of normal competition.<sup>200</sup> More recently the Court specified this concept saying that dominant undertakings must not strengthen their position “by using methods other than those which come within the scope of competition on the merits”.<sup>201</sup> The Treaties do not define the concept of competition on the merits. Nevertheless, this concept has been clarified by the Grand Chamber of the Court in *Post Danmark I*, where it is stated that “competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of

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<sup>197</sup> On this principle see Whish R. & Bailey D., *Competition Law*, Oxford University Press, 2015, 8<sup>th</sup> ed., p. 202.

<sup>198</sup> Case C-322/81, *Michelin I*, cit., para 57.

<sup>199</sup> Case C-85/76, *Hoffmann – La Roche*, cit., para 91.

<sup>200</sup> *Ibid.*

<sup>201</sup> Case C-280/08 P *Deutsche Telekom v Commission*, cit., para 177. See also Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601, para 1070 and Case C-52/09 *TeliaSonera*, cit., para 43. See also Case C-457/10 *AstraZeneca v Commission* P ECLI:EU:C:2012:770, para 75.

view of, among other things, price, choice, quality or innovation”.<sup>202</sup> This position of the Court is compatible also with the definition given by the Commission in the Guidance, according to which competition on the merits consists in offering lower prices, better quality and wider choice of new and improved goods and services.<sup>203</sup> Hence, competition on the merits by definition leads to the exclusion of less efficient competitors. Since the dominant firm is allowed to compete on the merits, it is allowed to drive from the market less efficient competitors. It follows that a ban on conducts that can exclude only non-efficient competitors would impair the possibility to compete on the merits and it would be tantamount to a ban on the dominant position in itself. Such a ban, thus, would be in contrast with Article 102 TFEU, which allows the presence of dominant positions on the market. The ECJ’s approach towards rebates appears to prohibit dominant undertakings to engage in practices that exclude even non-efficient competitors from the market or that make the access to the market more difficult for them. Indeed, the ECJ refuses to include the AEC test in the appraisal. As a result, when a dominant undertaking grants exclusivity or third category rebates, the ECJ does not take into any account the efficiency of competitors and it protects any competitor irrespective of its ability to compete. However, a non-efficient competitor would be driven from the market even in the absence of the rebates scheme and merely as a consequence of the competition process. Therefore, the exclusion of such a competitor does not seem able to affect competition or the market structure.

The ECJ’s approach appears to aim at the protection of the individual economic freedom of competitors. Dealing with rebates, indeed, the ECJ stressed the fact that the exclusivity and the loyalty-inducing effect inherently foreclose competitors.<sup>204</sup> Thus, the ECJ seems to interpret the presence of any competitor as part of the structure of the market. Every limitation of competitors’ freedom to stay in the market constitutes a decrease in the degree of competition that has been already weakened by the presence of the dominant undertaking in the meaning of *Hofmann La Roche*. Such an approach has a clear Ordoliberal origin.<sup>205</sup> Indeed, the protection

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<sup>202</sup> Case C-209/10 *Post Danmark I*, cit., para 22.

<sup>203</sup> Guidance on Article 82 EC Enforcement Priorities, cit., para 5.

<sup>204</sup> See for instance Case C-23/14, *Post Danmark II*, cit., para 36.

<sup>205</sup> See Kallaughner J. & Sher B., *Rebates Revisited: Anti-Competition Effects and Exclusionary Abuse Under Article 82*, *European Competition Law Review*, 2004, 25, p. 263; Venit J.S., *Article 82: The Last Frontier – Fighting Fire with Fire*, *Fordham International Law Journal*, 2005, 28, p. 1157; Rey P. & Venit J.S., *An Effect Based Approach to Article 102: A Response to Wouter Wils*, cit.; Venit J.S.,

of individual economic freedom against the economic power of dominant firms was the core element of the Ordoliberal competition policy. Ordoliberals were not concerned about efficiencies and consumers. By contrast, they believed that any competitor represented a restraint of the dominant firm power and, thus, it was necessary to preserve its presence on the market. All the inconsistencies emphasised above are due to this evident tension between, on the one hand, the attempt to protect the individual economic freedom and, on the other hand, the increasing necessity to found decisions on a sound economic analysis as well as the need to protect consumers.

Now it is necessary to establish whether the ECJ's approach can be explained or justified on the basis of the alleged Ordoliberal foundations of EU competition law. This is the topic on which we turn in the following paragraph.

### **3. Towards a Post-Ordoliberal Approach**

Even if the contribution of Ordoliberalism in shaping EU competition law cannot be negated, it is necessary to bring it back to the effective importance that it had. It appears, indeed, that its significance has been overestimated<sup>206</sup> and that EU competition law and, in particular, Article 102 TFEU cannot be merely seen as the application of Ordoliberal principles.

First, from the examination of the negotiation documents and the *travaux préparatoires* of Article 102 TFEU it results that the drafters were more concerned with productive efficiencies and the growth of the European economy rather than with individual economic freedom. They did not aim to protect competitors but costumers of the dominant undertakings. This seems confirmed by the wording of the provision in question, which focuses on exploitative abuses instead of exclusionary abuses.<sup>207</sup> Therefore, even though this finding does not exclude the anticompetitive nature of exclusionary practices, it shows that the main objective of the provision is not the protection of competitors and that Article 102 TFEU allows the protection of economic efficiencies and consumers.

Second, the evolution of the enforcement of competition law, in general, and

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*Case T-286/09 Intel v Commission*, cit. and Ahlborn C. & Padilla A.J., *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law*, in Ehelermann and Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, 2008. For a different opinion see Whish R. & Bailey D., *Competition Law*, cit., p. 205.

<sup>206</sup> O'Donoghue R. & Padilla A.J., *The Law and Economics of Article 102 TFEU*, cit., p. 58.

<sup>207</sup> Akman P., *Searching for the Long-Lost Soul of Article 82 EC*, cit.

of Article 102 TFEU, in particular, shows that they have multiple goals. Article 102 TFEU has been enforced to promote the market integration, to sustain the European industrial policy, the liberalisation of markets and to benefit consumers. The protection of individual economic freedom can be considered as one of the goals of Article 102 TFEU only in the light of the jurisprudence of the ECJ, in particular with respect to rebates. The evolution of the enforcement of Article 102 TFEU reveals also that, during the first decade of enforcement, this provision has never been applied, because the European interest at that time was to increase the economic power of European firms in order to enable them to compete at the international level. This finding is at odds with the basic Ordoliberal principles. Surprisingly, moreover, the reason of this lack of enforcement in the first decade has been emphasised exactly by Gerber, the main supporter of the Ordoliberal origin of EU competition law. Furthermore, notwithstanding the similarities between the Harvard School and Ordoliberalism,<sup>208</sup> in Europe not only Article 102 TFEU has not been applied in the first years, but also mergers and acquisitions have not been regulated for a long time. During the Harvard School period of influence, instead, the US approach was characterised by interventionism, protection of small and medium firms and control of mergers.

Third, even assuming a pure Ordoliberal genesis of EU competition law, its evolution has been characterised by a constant dialogue between the Commission and the ECJ. This process culminated in the so-called modernisation of competition law that entailed a greater attention to economic analysis within the enforcement of antitrust rules. In particular, the current application of Article 101 TFEU and merger control law is mainly concerned with efficiencies and consumer welfare. The interpretation of Article 102 TFEU given by the ECJ, in particular as regards rebates, constitutes an *unicum* within the landscape of modern competition enforcement. A dynamic view of competition law and the need of a coherent application within its different fields would require the adoption of a more economic approach in the application of Article 102 TFEU irrespective of the School of thought that influenced the genesis of this provision.

Fourth, as previously noted in chapter one, Ordoliberalism did not provide for

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<sup>208</sup> Amato G., *Antitrust and the Bounds of Power*, cit., p. 40. According to other authors it is not correct to draw an analogy between the Harvard School and Ordoliberalism, see Lovendhal Gormsen L., *A Principled Approach to Abuse of Dominance*, cit., p. 47.

specific competition rules that could be applied outside of the broader Ordoliberal political and economic context. It does not seem that the European Treaties can be considered the expression of an Ordoliberal economic constitution. Therefore, a strict Ordoliberal interpretation of Article 102 TFEU in an economic and political context that is not the Ordoliberal one seems inconsistent also with the Ordoliberal principles.

In the light of the foregoing, it appears that the alleged Ordoliberal origin of Article 102 TFEU cannot be a sufficient basis to justify the approach of the Court towards rebates. This does not mean that Ordoliberalism has not had an influence in shaping EU competition law, nor that individual economic freedom is not a goal of Article 102 TFEU. It means that individual economic freedom cannot be protected at the expenses of other goals and, first of all, at the expenses of consumer welfare. The protection of competitors is only a goal among others. Therefore, a balance is needed. In particular, it seems that the Commission in its Guidance has drawn the right balance of interests. Indeed, the Commission wishes to protect efficient competitors. This is to say only those competitors that could not be excluded as a result of the competition on the merits process. It seems, indeed, that by doing so the Commission is able to conjugate the protection of competitors and of economic efficiencies. Moreover, as explained above, the Guidance introduced for retroactive rebates a particular application of the AEC test, which allows protecting those competitors that are as efficient as the dominant undertaking only for the contestable share. This means that the Commission took into consideration that the very presence of a dominant undertaking can prevent competitors from reaching efficient performances. This application of the AEC test appears to be compatible with a strong protection of competitors where a dominant firm is at stake. Thus, the ECJ should adopt the approach proposed by the Commission confirming the line of reasoning of the Grand Chamber in *Post Danmark I*. This seems the only possible solution to avoid all the inconsistencies underlined in the precedent paragraph. It seems also appropriate the introduction of a *de minimis* threshold in the application of Article 102 TFEU. In the case of rebates, indeed, the lack of the AEC test and of a *de minimis* threshold can lead to the application of Article 102 TFEU in cases where there is no effect at all on competition. In this respect, it is worth noticing that even those scholars that advocate the current jurisprudence of the ECJ on rebates auspicate the introduction of such a

threshold.<sup>209</sup>

Nevertheless, it seems that there might be one case in which the ECJ could still deploy its formalistic approach privileging the protection of competitors irrespective of their efficiency. Indeed, where the dominant undertaking acquired its position thanks to the public power, for instance in the case of ex statutory monopolies, the ECJ might apply a quasi per se approach that protects less efficient competitors. In these circumstances, the permanence in the market of even non-efficient competitors can constitute a restraint to the monopolistic power of the dominant firm leading to the full liberalisation of the market in the long run. This conclusion appears also supported by the judgment in *Post Danmark I* where the Court stated that the origin of the dominant position should be taken into account in the appraisal of the lawfulness of unilateral conducts.

## CONCLUSIONS

By analysing the Schools of thought that influenced competition law on the two sides of the Atlantic Ocean it is possible to understand the similarities and the differences between those systems. It results, moreover, that the interpretation and enforcement of EU competition law developed over the years an increasing attention for efficiencies and consumer welfare. The so-called modernisation of competition law is the outcome of this development. Today, the Court's approach to Article 102 TFEU represents the only field in which this modernisation has not been achieved. In particular, the analysis of the jurisprudence on rebates schemes reveals that the ECJ is more concerned with the protection of competitors rather than with the protection of competition. This approach has been defined as Ordoliberal. It seems, in fact, that the ECJ is privileging the protection of individual economic freedom at the expenses of efficiencies. This was exactly the core of the Ordoliberal competition policy. The approach of the ECJ towards rebates, however, shows many inconsistencies which are explainable in the light of the tension between a formalistic approach aimed to protect competitors and the irrefutable need to found decisions on a sound economic basis. This tension leads to a contrast between different goals, which instead should be balanced as the Commission has done in its Guidance. Furthermore, as it results from

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<sup>209</sup> Whish R. & Bailey D., *Competition Law*, cit., p. 202 and 773 and Whish R., *Intel v Commission: Keep Calm and Carry On!*, cit., p. 3.

the analysis of the genesis and evolution of Article 102 TFEU there is no legal basis to favour an Ordoliberal interpretation and to protect individual economic freedom scarifying the protection of consumer welfare.

It appears that the ECJ is struggling with the process of modernisation of Article 102 TFEU. This period of transition is probably destined to end in the next years with the adoption of a more economic approach. It is difficult to establish how long this period of transition will last. The *Intel* judgment is still under appeal and the decision of the Court might shed some light on the inconsistencies examined above. It seems, however, that the time is not ripe to expect that this forthcoming judgment will constitute the turning point of the ECJ's approach.

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