

Rebates post-*Post Danmark II*

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Introduction

In *Post Danmark A/S v Konkurrencerådet* (*Post Danmark II*),¹ the European Court of Justice (‘CJEU’) gave a preliminary ruling which, *inter alia*, strongly indicated that, for the purposes of Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’),² retroactive rebates are treated with the same suspicion as exclusivity rebates, i.e. they are prohibited, unless objective justifications for the rebates are proven by the dominant undertakings.

The CJEU brought together the existing case law and adopted a two-stage, effects-based analysis, which, in theory, accords with the Commission’s increasing emphasis on effects. However, this article will show that the conclusion of illegality arising from this allegedly effects-based analysis, in the context of retroactive rebates, is almost inevitable from the outset: the analysis considers effects in only a superficial manner. In that respect, the legal position of retroactive rebates is much more similar to that of exclusivity rebates than one might assume from: the General Court’s *Intel Corp v Commission* (*Intel*) judgment,³ and, the general focus in EU jurisprudence on quantity-based rebates and exclusivity rebates having essentially pre-determined outcomes,⁴ with other rebates being treated with greater nuance. This assimilation, in treatment, of retroactive and exclusivity rebates is logical, given the anticompetitive characteristics that this article will demonstrate are shared by both kinds of rebates. However, in order for the approach to be *desirable* and fair on dominant undertakings, the prospect of objective justifications needs to be taken seriously by the Commission and the CJEU.

This article will do five things:

- i. outline the position on rebates before *Post Danmark II*;
- ii. explain the *Post Danmark II* ruling in the broader context of the existing case law and approach to Article 102;
- iii. illustrate how this judgment provides for a more consistent and logical approach to rebates to be more definitively and broadly adopted in the *Intel* appeal;⁵
- iv. explain why the strictness of the approach which *Post Danmark II* signals is generally justified and yet in need of being offset by adequate consideration of objective justifications; and,
- v. outline the questions that remain after the ruling.

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¹ Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015] 5 CMLR 25.

² The facts of the case predated the entry into force of the Treaty of Lisbon, thus Article 82 EC was the applicable provision. However, the interpretation given in the preliminary ruling will undoubtedly apply to the successor provision, Article 102, and therefore that provision will be referred to throughout this note.

³ Case T-286/09 *Intel Corp v Commission* [2014] 5 CMLR 9.

⁴ See sections 1(A)-1(B) below.

⁵ Case C-413/14 P *Intel Corporation v Commission* (21 June 2016).

1. Pre-Post Danmark II

A. Definitions and the tripartite categorisation

Before *Post Danmark II*, rebates had been, for legal purposes, divided into three categories:⁶ quantity rebates; exclusivity rebates; and, rebates which do not fit neatly within either category (termed ‘residual rebates’, for present purposes). This tripartite categorisation was adopted by the General Court in *Intel*, and characterizes the approaches typically taken to different kinds of rebates.

Quantity rebates are where a customer enjoys a price reduction that is based solely on the volume of purchases.⁷ Quantity rebates are ‘generally considered not to have the foreclosure effect prohibited by [Art 102],’⁸ because they are ‘deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position.’⁹

Exclusivity rebates are where a customer enjoys a price reduction only if they obtain most or all of their requirements from the undertaking. Exclusivity rebates by a dominant undertaking are ‘incompatible with the objective of undistorted competition within the common market’¹⁰ because they are ‘designed to remove or restrict the purchaser’s freedom to choose his sources of supply and to deny other producers access to the market.’¹¹ The mischief behind the strict approach taken towards exclusivity rebates therefore appears to be protecting the commercial freedom of buyers and preventing foreclosure of (potential or actual) competitors.

The residual rebates are those by virtue of which a customer enjoys a discount without a direct condition of exclusive or quasi-exclusive custom, but ‘where the mechanism for granting the rebate may also have a fidelity-building effect.’¹² These rebates are assessed in light of the criteria and rules governing the grant of the rebate,¹³ and therefore, in theory, do not have the almost pre-determined outcome to which quantity rebates and exclusivity rebates are subject. The residual category includes target or ‘conditional’ rebates. Target rebates are where a customer enjoys a discount in light of purchasing a specified number of units. Within target rebates, Jones and Sufrin allude to four further descriptors,¹⁴ which can be framed with regard to two further distinctions. First of all, target rebates may be *standardized*, or *individualized*. Standardized rebates are where all customers have the same target and discount; individualized rebates are where customers have different targets and/or discounts. Additionally, one can distinguish between *incremental* rebates, and *retroactive* rebates. Incremental rebates are where the discount applies only to purchase above the target. In contrast, retroactive rebates are where a customer is promised a discount *on all of their purchases* provided that they purchase a certain number of units from the undertaking. This is *retroactive* in the sense that the discount applies in respect of all the purchases which predate the meeting of the target. As such, they do not require exclusivity to a certain vendor, but are liable to *encourage* exclusivity, to an increasing extent as the customer nears the target.

Retroactive rebates are seen as concerning from a competition point of view, because they ‘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*,’¹⁵ which therefore means that competitors would have to offer extremely

⁶ *Intel* (n 3) [74].

⁷ Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 (*Michelin I*) [72].

⁸ *Intel* (n 3) [75].

⁹ *ibid.*

¹⁰ *ibid* [77].

¹¹ *ibid.*

¹² *ibid* [78].

¹³ *ibid.*

¹⁴ Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, OUP 2016) 435.

¹⁵ Case C-549/10 *P Tomra Systems ASA v Commission* [2012] 4 CMLR 27 (*Tomra*) [78].

low prices in order to gain the custom of the customer that is near to reaching its target. This is illustrated by the example below.

Assume that: X is a customer; Y is a dominant undertaking that supplies X; and, Z is attempting to compete with Y. Y promises X a 20% discount on all of its purchases, provided that it purchases at least 100 units. If each unit costs £1, then 100 units would cost £100 without the discount, and £80 with the discount. However, because the discount applies only retroactively, once 100 units have been bought, X continues to pay £1 per unit until that point. Before X has bought any units, Z is capable of offering as low a price by charging X 80 pence per unit. Once X has bought 50 units from Y for £50, its next 50 units will essentially cost only £30, because when it reaches 100 units, the rebate will be applied. As such, the average cost of the latter 50 units is 60 pence. Therefore, in order to compete on price, Z has to lower its asking price to 60 pence. In contrast, the average price received by Y would never be below 80 pence. Once X has bought 80 units from Y for £80, the next 20 units essentially cost X nothing. Therefore, in order to offer as favourable a deal, Z would have to give X 20 units for free; whereas, even when Y fulfils its promise of the 20% discount upon the target being reached, it has still received 80 pence per unit. When X has bought 99 units for £99, Z would have to pay X £19 and give X the unit for free, in order to match Y's offering. This is what is known as the *suction effect*: the closer X gets to the target, the more inclined it is to purchase from the rebate-offeror, and the less profitable (or greater loss-incurring) price competitors have to offer in order to compete. When this practice is implemented by dominant undertakings, and the figures are in millions, retroactive rebates can have an eliminatory effect on competition. As will become clear over the course of this article (and even simply by surveying the facts of *Post Danmark II*), retroactive rebates harbour some of the same anticompetitive characteristics as exclusivity rebates, and can be just as damaging to competition.

B. The legal analysis of rebates

As alluded to above, the outcome in respect of either a quantity rebate, or an exclusivity rebate, is clear from the outset, but the same could not, prior to *Post Danmark II*, be said for any residual rebates. It is crucial to note, however, that the positions in respect of quantity rebates and exclusivity rebates are not without qualification. For instance, in *Intel*, quantity rebates were said to be 'generally considered'¹⁶ not to be anticompetitive; and, exclusivity rebates were seen as anticompetitive 'save in exceptional circumstances'¹⁷ – the possibility of 'objective justification'¹⁸ was recognized. As such, these outcomes are not absolute. The position of the residual rebates was considered by the CJEU in *British Airways Plc v Commission* ('*British Airways*'),¹⁹ before the formal categorisation was made in *Intel*. It adopted a two-stage analysis ('the two-stage test', hereafter), in respect of (what are now) residual rebates.

The first stage is the determination of whether the rebates can produce an *exclusionary effect*, that is whether they are *capable* of both 'making market entry very difficult or impossible for competitors of the undertaking in a dominant position'²⁰ and 'making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners'.²¹ In other words, the two elements of exclusionary effect concern difficulty of entry and customer freedom. This assessment will take account of 'all the circumstances',²² particularly the criteria and rules governing the grant of the rebate, and 'the particular conditions of competition prevailing on the relevant market'. If the first stage is answered in the affirmative (i.e. there is deemed to be the capability of

¹⁶ *Intel* (n 3) [75].

¹⁷ *ibid* [77].

¹⁸ *ibid* [81].

¹⁹ Case C-95/04 P *British Airways Plc v Commission* [2007] ECR I-2331.

²⁰ *ibid* [68].

²¹ *ibid*.

²² *Post Danmark II* (n 1) [29].

exclusionary effect), the second stage entails consideration of whether there is an ‘objective economic justification’²³ for the rebates.

C. Objective justifications

Objective justifications have their roots in the two-stage test explained above. In *British Airways*, the CJEU considered whether the exclusionary effect ‘may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer’.²⁴ On the facts, it was deemed not to be justified in that way, as is considered in section 2(C) below. However, the *British Airways* ruling was important for making clear the possibility of a defence to exclusionary effect, under Article 102.

The possibility of objective justifications was reiterated and developed in *Post Danmark v Konkurrencerådet* (*Post Danmark I*),²⁵ where the CJEU alluded to two kinds of objective economic justification: where the conduct is ‘objectively necessary’; or, where the conduct may be ‘counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers’.²⁶

The notion of *objective necessity* was not made clear in *Post Danmark I*, but the Guidance Paper regarding the *enforcement priorities in applying [Art 102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (the ‘**Guidance Paper**’)²⁷ refers to conduct that is ‘objectively necessary’ to ‘factors external to the undertaking’.²⁸ This is not particularly clear, and the only elaboration by the Commission is the example of ‘health and safety reasons related to the nature of the product in question’, and reiteration that dominant undertakings must not take steps on their own initiative to exclude products which it regards as dangerous or inferior. The scope of this version of the defence is, therefore, unclear – although, a possible use of it will be considered in section 4(C)(I) below.

The *efficiencies* version of the defence was more comprehensively explained by the CJEU, in *Post Danmark I*. It was said that ‘it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition’.²⁹ The Guidance Paper endorses this defence in a similar manner,³⁰ but refers to there being ‘no net harm to consumers [that] is likely to arise’,³¹ and requires that the efficiency gains ‘outweigh’³² (rather than counteract) any likely negative effects on competition and consumer welfare. This has been said by Nazzini³³ to be inconsistent with *British Airways*, and to be too high a threshold. This may well be true, but it is certainly possible and realistic that some conduct may provide the requisite neutral or positive effect on consumer welfare; indeed, that is something that it is reasonable to encourage dominant undertakings to do.

²³ *British Airways* (n 19) [69].

²⁴ *ibid* [86].

²⁵ Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR I-0000.

²⁶ *ibid* [41].

²⁷ Commission, ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ (Communication) (2009/C 45/02).

²⁸ *ibid* [29].

²⁹ *Post Danmark I* (n 25) [42].

³⁰ Guidance Paper (n 27) [30].

³¹ *ibid*.

³² *ibid*.

³³ Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP 2011) 308.

Whilst the objective justifications defence appears to be narrow, it is available, and the full extent of its reach remains to be seen. It is important to note the preface, in the *Post Danmark I* description of the versions of the defence, of '[i]n particular', i.e. it was recognized that other versions may exist (this will be referred to as 'the "in particular" caveat'). As will be demonstrated in section 4(C)(I) below, there is already a third possible version of the defence waiting to be realized, and it should not be assumed that the current versions of the defence amount to an exhaustive list of the possible circumstances in which the defence may be attained. This article will use the term 'objective justifications' to refer to this defence in its entirety (thereby including the two recognized versions of the defence, and other possible versions of the defence).

2. Post Danmark II

A. Factual background and the preliminary ruling

The Konkurrencerådet (the Danish Competition Council) found that Post Danmark A/S (**Post Danmark**) was an 'unavoidable trading partner'³⁴ on the relevant market for the 'distribution of bulk mail',³⁵ with a market share of over 95%. During the relevant period, the market for the distribution of bulk mail was subject to high access barriers due to economies of scale, and a statutory monopoly that accounted for 70% of total demand. Therefore, Post Danmark clearly held a dominant position.³⁶ The only 'serious competitor' on the market was Bring Citymail A/S (**Bring Citymail**),³⁷ which, when active, delivered direct advertising mail in a service available to approximately 40% of the relevant households.³⁸

Post Danmark implemented a rebate scheme in respect of direct advertising mail. Though this is the segment of the market in which Bring Citymail sought to compete with Post Danmark, it should be noted that the implementation of a standardized rebate scheme was not a reaction to Bring Citymail's entry, as the rebates began in 2007, almost four years before Bring Citymail's entry into the market. The rebates applied to mailings which were: presented in batches of at least 3,000 at a time; and, aggregated at least 30,000 letters per year, or represented a minimum annual gross value which was approximately €40,200³⁹ – crucially, the rebate applied retroactively to those who met the target.

Having suffered losses in the region of €67m, Bring Citymail withdrew from the Danish market in 2010, but had lodged a complaint with the Konkurrencerådet in 2009. Their complaint precipitated the proceedings that eventually led to the preliminary ruling. The Konkurrencerådet found that Post Danmark had abused its dominant position, by applying rebates which 'had the *effect of tying customers* and '*foreclosing*' the market, without being able to substantiate the *efficiency gains* that might have benefited consumers and *neutralised those rebates' restrictive effects on competition*'.⁴⁰ The Konkurrenceankenævnet (the Competition Appeals Tribunal) upheld that decision, and Post Danmark consequently brought the case before the Sø- og Handelsretten (the Maritime and Commercial Court). Due to the uncertainty of the criteria which determine whether a rebate scheme is *capable of having an exclusionary effect*, the Sø- og Konkurrenceankenævnet referred a number of questions to the CJEU under Article 267 TFEU.

The questions referred sought a significant amount of clarification surrounding the application of Article 102 to rebates, thus it is no surprise that the CJEU gave such a comprehensive statement of the law. The CJEU reformulated the questions referred to, with the effect of presenting itself with,

³⁴ *Post Danmark II* (n 1) [14].

³⁵ *ibid* [13].

³⁶ *ibid* [14].

³⁷ *ibid* [11].

³⁸ *ibid* [10].

³⁹ *ibid* [7].

⁴⁰ *Post Danmark II* (n 1) [13] (emphasis added).

inter alia, an opportunity to ‘clarify the criteria that are to be applied in order to determine whether a rebate scheme, such as that at issue in the main proceedings, is liable to have an exclusionary effect on the market contrary to [Article 102 TFEU]’.⁴¹ This could be argued to have slightly widened the inquiry presented by the Sør- og Handelsretten, but this widening is welcome as it provides greater certainty in the general interpretation of an area which has seen a number of rulings⁴² in recent years.

B. The CJEU’s judgment

The CJEU characterized the rebates as ‘standardised’, ‘conditional’, and ‘retroactive’.⁴³ It was noted that the rebates could not be regarded as ‘simple quantity rebate[s]’, nor as ‘loyalty rebate[s]’,⁴⁴ and therefore was a residual rebate. Interestingly, *Intel* was not referred to at all by the CJEU. Given the huge interest which has surrounded the *Intel*, one might have expected some reference to it by the CJEU, even if just an endorsement of the somewhat formulaic tripartite distinction used by the General Court in *Intel*.⁴⁵ As shall become clear in this article, the assimilation of retroactive and exclusivity rebates undermines the tripartite division in its current form. Nonetheless, it should be noted that the two-stage analysis was applied *because* of the circumstances, i.e. because the rebates were not clearly either volume- or exclusivity- based. As such, one should not hastily assume that the tripartite division has been abandoned. Indeed, Sidiropoulos has claimed that the CJEU confirmed the General Court’s approach⁴⁶ – in lieu of explicit use of the tripartite distinction, this seems premature. As such, it will be interesting to see if the tripartite distinction will be reaffirmed in the *Intel* appeal,⁴⁷ which was heard in June 2016 – this will be considered in section 5 below.

Applying the two-stage test, the CJEU found that the rebate scheme produced an anti-competitive exclusionary effect.⁴⁸ Aggravating factors in reaching that conclusion included the fact that the rebates applied retrospectively, the length of the reference period (one year), and the extent of Post Danmark’s dominance (bearing in mind its statutory monopoly and significant market share). The second stage of the test was reiterated, but the CJEU did not pass judgment on the satisfaction of the objective justification defence.

C. Chan’s ‘virtually unavailable justifications’

Sunny Chan has argued that, in light of the CJEU’s analysis in *Post Danmark II*,⁴⁹ retroactive rebates are *per se* unlawful, rather than retroactivity simply being a contributory factor. Furthermore, Chan claims that *objective economic justifications* are ‘virtually unavailable’,⁵⁰ in the case of retroactive rebates, in light of failed attempts to justify rebates making reference to diminishing marginal utility and economies of scale. It is submitted that, whilst Chan is right to suggest that it is difficult for undertakings to avail themselves of the objective justifications, his claim of economies of scale being a virtually unavailable justification is exaggerated and presumptuous. As such, it is too soon to say that retroactive rebates are *per se* unlawful – they are subject to the same *qualified per se* prohibition that

⁴¹ *Post Danmark II* (n 1) [21].

⁴² *British Airways* (n 19); Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] ECR II-2631; *Intel* (n 3); *Tomra* (n 15).

⁴³ *Post Danmark II* (n 1) [23]-[25].

⁴⁴ *ibid* [28].

⁴⁵ *Intel* (n 3) [75]-[78].

⁴⁶ Konstantinos Sidiropoulos, ‘Post Danmark II: A Clarification of the law on Rebates under Article 102 TFEU’ (*European Law Blog*, 11 December 2015) <<http://europeanlawblog.eu/?p=3013>> accessed 21 September 2016.

⁴⁷ n 5.

⁴⁸ *Post Danmark II* (n 1) [42].

⁴⁹ Sunny SH Chan, ‘Post Danmark II: per se unlawfulness of retroactive rebates granted by dominant undertakings’ (2016) 37(2) ECLR 43.

⁵⁰ *ibid* [49] (emphasis added).

exclusivity rebates are. The extent of this qualification is unclear, but it will be submitted that the qualification must be taken seriously in order for the rule to operate fairly to dominant undertakings.

Chan cites *Michelin I*,⁵¹ where the CJEU clearly refuted wishes to ‘sell more’ or ‘spread production more evenly’⁵² as economic justifications. It is clear from the judgment, and its explanation by Chan,⁵³ that the CJEU has rejected this economic justification, in the context of retroactive rebates. However, Chan misrepresents the CJEU’s rejection of this justification – he claims that diminishing marginal utility has been rejected in *Michelin I*. But this is not the case: seeking to spread production more evenly is completely different from taking note of the correlation between units purchased, and elasticity of demand. As such, whilst *Michelin I* does show a rejection of the objective justifications of wishes to sell more or spread production more evenly, undertakings *can* allude to diminishing marginal utility as a justification.

In respect of economies of scale, Chan draws upon *British Airways*.⁵⁴ Chan is correct to state that economies of scale did not prevail as an objective justification, however, as he recognizes, this was because the CJEU was unwilling to substitute its own assessment of market data for that of the Court of First Instance⁵⁵ – two conclusions follow from this: that the Court of First Instance deemed the justification not to have been demonstrated on the facts; and, that the CJEU was unwilling to reconsider the assessment of data that resulted in the former conclusion by the Court of First Instance. The importance of these two conclusions is that they show that Chan misleads us by suggesting that the CJEU rejected the economies of scale justification in principle. This is not the case – the Court of First Instance did not deem the justification to have been demonstrated *on the facts*, and the CJEU was unwilling to substitute its assessment of those facts, meaning that any conclusion of an error of law would not have been likely. The possibility of economies of scale as a justification was not at all ruled out by *British Airways*. On the contrary, the Court of First Instance implicitly recognized its existence as a justification, in that it was willing to consider whether the facts demonstrated that the rebate scheme ‘allow[ed] [BA] to reduce its costs’.⁵⁶ This suggests that *if BA had shown economies of scale by virtue of reduced costs flowing from the rebate scheme*, then there would have been the possibility of an objective justification. Furthermore, the Commission has shown clear attempts⁵⁷ to undertake a more economic analysis in the context of rebates in infringement Decisions since *British Airways*, thus it is submitted that such a justification is far from *virtually unavailable*.

Furthermore, Chan claims that ‘[t]he virtual impossibility of justifying a retroactive rebate is borne out by the fact that all dominant undertakings in *British Airways*, *Tomra*, and *Post Danmark II* did not succeed in proffering a justification for their retroactive rebates’.⁵⁸ However, the mere fact that these undertakings failed to provide such a justification does not in itself demonstrate its ‘virtual impossibility’ – it could just mean that no such justification existed on the facts. Indeed, it seems unlikely that an undertaking with a 95% market share and a statutory monopoly over most of that market could justify a retroactive rebate scheme with a long reference period. Similarly, Tomra exercised a complex structure of exclusivity agreements, quantity commitments and fidelity-inducing discounts – this demonstrated a patchwork of agreements geared towards foreclosure. British Airways based its rebates on increases in sales from one year to the next, with the possible result of such a

⁵¹ *Michelin I* (n 7).

⁵² *Post Danmark II* (n 1) [85].

⁵³ Chan (n 49) 49.

⁵⁴ *ibid.*

⁵⁵ *British Airways* (n 19) [88].

⁵⁶ *ibid* [291].

⁵⁷ See, in particular: *Prokent-Tomra* (Case COMP/E-1/38.113) Commission Decision 2008/C219/12 [332]; and, the enormous *legal and economic assessment* that the Commission undertook in *Intel* (Case COMP/37.990) Commission Decision 2009/C227/07.

⁵⁸ Chan (n 49) 49.

scheme being an exponential year-on-year suction effect – a rebate scheme of this kind does *not* seem correlative to or necessary as to meet high fixed costs. As such, it is respectfully submitted that the possibility of retroactive rebates being justified under the second limb of the *British Airways* test is not precluded from the CJEU's approach, nor does the existing case law demonstrate that such a justification is impossible, or even virtually available. The prospect of attainable objective justifications is further considered in section 4(C) below.

3. The assimilation of retroactive rebates and exclusivity rebates

The two-stage analysis adopted in *Post Danmark II* is, as has been noted, nothing new. Stemming from *British Airways*, it was also alluded to by the General Court in *Intel*, in the context of exclusivity rebates.⁵⁹ This led to Nicholas Petit's claim that, following *Intel*, exclusivity rebates are subject to a 'modified *per se* prohibition rule'.⁶⁰ The *modification*, which Petit referred to, is the qualification that objective justifications can prevent an exclusivity rebate from infringing Article 102 (i.e. the second limb of the two-stage test).

This qualified prohibition approach is not exclusive to rebates, Article 102, or even competition law as a whole. We see it in respect of each of the four freedoms: in respect of goods, Article 34 is qualified by Article 36; in respect of services and establishment, Article 49 is qualified by Article 52 and Article 56 is qualified by Article 62; in respect of capital, Article 63 is qualified by Article 65; and, in respect of persons, Article 27 of Directive 2004/38 qualifies the various rights of movement. Within competition law, Article 102's sister prohibition, Article 101(1), is qualified by Article 101(3). The approaches in respect of the four freedoms and Article 101 are analytically and formally different to that of Article 102, in that the equivalent justificatory defences, in respect of the former, render conduct outside the scope of the prohibition (or, in the case of Article 101, render the prohibition *inapplicable*).⁶¹ However, the premises are the same: behaviour that is factually or assumedly unlawful can escape the finding of an infringement of EU law in all of these contexts, by virtue of meeting certain conditions; Article 101 and 102 are both familiar with qualified rules.

Furthermore, in the contexts of both Article 101 and Article 102, certain kinds of behaviour have been seen as automatically abusive. Within Article 101, restrictions 'by object' have traditionally been assumed to automatically be abusive (e.g. price-fixing⁶²), though it is worth noting both the potential significance of the *de minimis* Notice⁶³ in reducing the scope of the applicability of Article 101 to 'object' restrictions, as well as the recent dilution by the CJEU of the analysis taken in respect of restrictions by object.⁶⁴ Within Article 102, prices below average variable cost have been seen as necessarily abusive.⁶⁵ It is, therefore, nothing novel for certain conduct to be automatically regarded as abusive. Similarly, Article 101(3) will seldom apply to object or hard-core restrictions, and *objective justifications* cannot realistically be proven in cases of selling below average variable cost,⁶⁶ so it would

⁵⁹ *Intel* (n 3) [80]-[81].

⁶⁰ Nicolas Petit, 'Intel, Leveraging Rebates and the Goals of Article 102 TFEU' (2015) 11(1) Euro C J 26.

⁶¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202, Article 101(3).

⁶² Case 8/72 *Vereeniging Van Cementhandelaren v Commission* [1972] ECR 977; the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (C(2014) 4136) [2.1.1].

⁶³ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (C(2014) 4136).

⁶⁴ See, in particular: Case C-32/11 *Allianz Hungária v Gazdasági Versenyhivatal* [2013] 4 CMLR 25 [36]; Case C-67/13 *Groupement des Cartes Bancaires v Commission* [2014] 5 CMLR 22 [53]; Case C-172/14 *ING Pensii* [2015] 5 CMLR 15 [31]; Case C-286/13 *Dole Food v Commission* [2015] 4 CMLR 16 [117]; Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome* [2016] 4 CMLR 1 [17]; and, Case C-373/14 *Toshiba Corp v Commission* [2016] 4 CMLR 15 [26]-[29].

⁶⁵ Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359 [71].

⁶⁶ *Post Danmark I* (n 25) [27].

be nothing revolutionary for retroactive rebates by dominant undertakings to be *per se* unlawful (and thereby excused from the finding of an infringement).

What the examples above seek to demonstrate is that a presumed prohibition rule is far from unheard of in EU competition law, and the same is true for a *qualified* prohibition rule. Focusing on rebates, and the effect of *Post Danmark II*, it becomes clear that this is precisely what the CJEU has, in effect, fostered in its judgment. It is crucial, at this point, to note that the *analysis* of exclusivity rebates and retroactive rebates *does* still superficially differ following *Post Danmark II*. The General Court, in *Intel*, was explicit in stating that ‘an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect’ is not necessary in order to find that exclusivity rebates are abusive.⁶⁷ In contrast, the General Court noted, in the context of *third category* rebates, that the criteria and rules need considering,⁶⁸ and this was supported by the CJEU in *Post Danmark II*,⁶⁹ with ‘all the circumstances’ being relevant. As Chan correctly recognizes, ‘all the circumstances’ concerns whether or not the rebate is retroactive, with the result that retroactivity renders a rebate unlawful.⁷⁰ In this respect, it is open to question whether retroactive rebates really are treated differently to exclusivity rebates. The *process* by which the qualified *per se* prohibition comes about is claimed to be different, however, the *end result* is typically not. This is because the objective justification defence provides, in the context of exclusivity rebates, the same opportunity that (but for the narrow application which Chan highlights) would arise during the effects analysis of ‘all the circumstances’, in respect of retroactive rebates. A more logical approach would surely be to admit that retroactive rebates are seen in the same light as exclusivity rebates, and are treated as such. This would mean applying the same qualified *per se* prohibition rule.

The claim that retroactive rebates are now subject to, in effect, a qualified *per se* prohibition rule alongside exclusivity rebates is hardly a shocking or striking conclusion – both situations concern rebates which have traditionally been seen as abusive under Article 102. What the conclusion does demonstrate is the CJEU having a more uniform approach to rebates which are conducive to building fidelity in an anticompetitive manner. Retroactive (but non-exclusive) rebates and exclusivity rebates differ in that fidelity is not a *condition* (but, rather, a likely result) of the former, whereas it is a condition (and, indeed, the very premise) of the latter. However, the feared effect (and frequently common intention) of both is similar: exclusionary effects based on either the encouragement or requirement of buying (almost or entirely) exclusively from the dominant undertaking. In other words, the mischief behind any finding of retroactive or exclusive rebates as abusive under Article 102 is preventing arrangements whereby undertakings are put under overwhelming commercial pressure to purchase from the dominant undertaking *rather than its competitors, because of* the rebate scheme operated by the dominant undertaking. As such, it is logical to have a similar approach, with the same outcome, to both kinds of rebates. These rebates are distinct from the nature of quantity rebates, in that there is clear and independent commercial pressure in the context of exclusivity rebates (the condition of exclusivity) and retroactive rebates (the suction effect), whereas there is no such pressure in the context of quantity rebates.

Post Danmark II was important in nurturing the common approach: the CJEU’s analysis emphasized, when considering ‘all the circumstances’, the retroactive nature of the rebates⁷¹ in almost as damning a manner as the General Court did in *Intel*, in respect of exclusivity rebates.⁷² This is why the different form of analysis does little to distinguish or affect the likely conclusions that will be drawn in cases of retroactive rebates, and exclusivity rebates, respectively. This generally strict view of

⁶⁷ *Intel* (n 3) [80].

⁶⁸ *ibid* [78].

⁶⁹ *Post Danmark II* (n 1) [29].

⁷⁰ Chan (n 49) [47]-[48].

⁷¹ *Post Danmark II* (n 1) [32]-[33].

⁷² *Intel* (n 3) [77].

the CJEU is consistent with the previous case law⁷³ and, as the following section will demonstrate, capable of being appropriate given the similarities shared by exclusivity rebates and retroactive rebates.

4. Qualified per se prohibition of retroactive rebates – the right approach?

This section will analytically consider the appropriate role of the effects of the allegedly anticompetitive conduct. As explained below, the Commission is increasingly considering the effects of the conduct in question, so as to determine whether it amounts to an exclusionary abuse; on the other hand, the Courts have indicated that the effect on competition is not as crucial an issue. If the Courts are not concerned with the effects on competition, for the purposes of reaching the conclusion that there is exclusionary abuse (under the first stage of the two-stage analysis), then it is particularly important that the lack of anticompetitive effects can still prevent the finding of an infringement of Article 102. In other words, this article argues that retroactive rebates are subjected to a qualified *per se* prohibition – if this is to be justifiable, then the qualification must be more than illusory, i.e. the objective justifications must not be *virtually unavailable*, and must be taken seriously by both the Commission and the European Courts.

A. The effects-based approach

In 2009, the Commission published the aforementioned Guidance Paper.⁷⁴ In respect of price-based exclusionary conduct (such as rebates), the Commission stated that it will normally intervene ‘where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure’.⁷⁵ Various factors were outlined as to how such a determination will be made, and it was stated the assessment ‘will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices’.⁷⁶ This shows that the Commission is interested in the impact that the practice in question has had on the market, i.e. it has moved towards an *effects-based approach*.

It must be noted that the Commission states that ‘[i]f it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred’. There is a hugely important distinction between this, and the approach that is suggested by this article. This article suggests *prima facie* prohibition, with the (genuine) possibility of objective justifications; whereas, the inference suggested by the Commission in the quote above is one of *automatic* and *unqualified* prohibition. This article is concerned not with the Commission’s claim of some practices possibly being capable of having their competitive intent inferred, but, rather, with the general effects-based approach which the Commission outlines in the Guidance Paper (as explained in the previous paragraph).

B. The CJEU’s neglect of the effects-based approach for the purposes of establishing exclusionary effect

Whilst the Commission has indicated its intent to pursue a more effects-based approach, the Courts have, thus far, been cursory in any such analysis. Indeed, *Intel* and *Post Danmark II* are ideal examples of this.

In *Intel*, the General Court was dismissive of the need for an analysis of effects, particularly in the context of exclusivity rebates. The General Court stated that ‘the question whether an exclusivity rebate can be categorized as abusive does not depend on an analysis of the circumstances of the case

⁷³ See the list in (n 42).

⁷⁴ n 27.

⁷⁵ Guidance Paper (n 27) [20].

⁷⁶ Guidance Paper (n 27) [21].

aimed at establishing a potential foreclosure effect’;⁷⁷ and, that the as-efficient-competitor test (another effects-based element of the Guidance Paper) would not ‘rule out the possibility that [market access] has been made more difficult’.⁷⁸ This shows the General Court being disinterested in effects-based analysis, in instances where the anticompetitive nature of conduct can be presumed.

In *Post Danmark II*, the CJEU confirmed that the as-efficient-competitor test ‘must be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme’.⁷⁹ The CJEU supported AG Kokott’s claim that there was nothing in [Article 102 to ‘support the inference of any legal obligation requiring that a finding to the effect that a rebate scheme operated by a dominant undertaking constitutes abuse must always be based on a price/cost analysis’⁸⁰ such as the as-efficient-competitor test.

It is clear from *Intel* and *Post Danmark II* that the effects-based approach is unlikely to significantly impact upon the jurisprudence of the Courts. For that very reason, it is crucial that dominant undertakings are given proper opportunity to justify behaviour, on the basis of it not being anticompetitive.

C. The answer to the neglect of the effects-based approach: taking objective justifications seriously

The neglect, by the Courts, of the effects-based approach can be (and has rightly been)⁸¹ criticized, but the purpose, in this article, is to *explain* the current approach of the Courts, and propose how it can be further developed into a justifiable and clear approach to rebates. In other words, this article recognizes that the CJEU has made clear its disinterest with effects *for the purposes of demonstrating exclusionary effect*, and therefore considers the more open question of objective justifications, and how this stage in the two-stage analysis can be utilized to provide a more coherent framework for assessing rebates.

It is submitted that the place for consideration of effects is the determination of whether objective justifications exist (i.e. the second stage in the two-stage test), rather than whether a rebate *prima facie* has an exclusionary effect. The reason for this is that it is a more certain, predictable manner of analysis. Dominant undertakings know that retroactive or exclusivity rebates will be seen as unlawful *save for* objective justifications, rather than having to rely on an inconsistent (as between the Courts and the Commission),⁸² and therefore uncertain, approach to the relevance of effects to the establishment of an exclusionary effect. As such, they can, as a matter of course, consider what objective justifications might be raised for such a practice, before embarking on the rebate scheme. A quite legitimate complaint against this would be that it appears to reverse the burden, given that ‘[i]t is incumbent upon the dominant undertaking to provide all the evidence necessary to demonstrate that the conduct concerned is objectively justified’.⁸³ However, it is submitted that the current situation has, in essence, already seen that burden reverse – formally recognising this and more seriously considering objective justifications can actually be *advantageous* to dominant undertakings. The benefit it has is that undertakings would not be under the illusion of their rebates being truly assessed in all of the relevant circumstances before a conclusion as to their exclusionary effect is determined – *Post Danmark II* and *Intel* demonstrate that exclusivity and retroactive rebates are both subjected to essentially pre-determined outcomes. What this article is proposing is that these pre-determined outcomes (in respect of the first stage of the analysis) be more openly acknowledged and

⁷⁷ *Intel* (n 3) [80].

⁷⁸ *ibid* [150].

⁷⁹ *Post Danmark II* (n 1) [61].

⁸⁰ *ibid*, Opinion of AG Kokott [61].

⁸¹ Patrick Rey & James Venit, ‘An Effects-Based Approach to Article 102: A Response to Wouter Wils’ (2015) 38(1) *World Competition* 3, 10.

⁸² *ibid*; section 4(B) above.

⁸³ Guidance Paper (n 27) [31].

allowed to form part of a genuine exercise of the purported two-stage analysis, whereby objective justifications are taken seriously.

It has been demonstrated in section 2(C) above that the prospect of objective justifications is by no means excluded. Section 2(C) put forward the claim that the fact that objective justifications were not, in the view of the Commission or the General Court/CJEU (as applicable), demonstrated in the likes of *British Airways*, *Tomra*, *Intel*, and *Post Danmark II* does *not* mean that they are virtually unavailable. It does not follow, however, that they are *sufficiently* available. Section 2(C) outlined the two currently established varieties of objective justifications: *objective necessities*; and, *efficiencies*. The former of these is unclear, and the latter is very narrow. In order to take objective justifications seriously, and thereby justify the qualified *per se* approaches taken to exclusivity and retroactive rebates, it is essential that objective justifications are construed in a more predictable and broad manner. This section will consider how objective justifications might be used in practice by dominant undertakings to justify (in particular) retroactive rebates, alluding to: meeting the competition; economies of scale; and, high fixed costs.

I. Meeting the competition

Meeting the competition has typically been seen in the context of selective price cuts. In *France Télécom*, it was held that ‘the fact that an undertaking is in a dominant position cannot deprive it of the right to protect its own commercial interests if they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests’, with the caveat that ‘such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it’.⁸⁴ It could well be argued that where a dominant undertaking operates a retroactive rebate so as to protect its commercial interests, but does not have the *purpose* of strengthening or abusing their dominant position, then the defence should be available. As Jones and Sufrin have noted, this gains support from the reference, in the midst of the discussion of justifications in *Post Danmark I*, to *United Brands*,⁸⁵ where it was accepted that ‘fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests’.⁸⁶

In the context of exclusivity rebate, it is understandable that the Commission would not allow the defence of meeting the competition: one cannot truly be said to *meet* the competition by eliminating it. However, in respect of retroactive rebates, it is much more plausible that one might meet the competition without eliminating it – there is a clear difference in terms of anticompetitive intent. Of course, if the effect of the rebate *was* to eliminate competition, then the defence would fail;⁸⁷ however, in other cases, the meeting of competition or protection of commercial interests could encapsulate a basis of objective justification. In the context of *Post Danmark II*, the condemned scheme predated Bring Citymail’s entry into the market – if it had been a reaction to such a market entry, then one could envisage the *meeting the competition* defence being at least arguable.

The taxonomy of this as a separate justification or falling within *objective necessity* is less important than the *substance* of what it can exist in, but it is worth brief consideration. Jones and Sufrin take the view that the CJEU considers that protection of commercial interests may be ‘another type of justification rather than a separate defence’,⁸⁸ i.e. it is a third version of the objective justification defence. However, given the reference to health and safety needs, in the Guidance Paper,

⁸⁴ Case C-202/07 P *France Télécom v Commission* [2009] ECR I-02369 [46].

⁸⁵ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1976] ECR 00425.

⁸⁶ *ibid* [189].

⁸⁷ See section 1(C) above.

⁸⁸ Jones and Sufrin (n 14) 371.

it might be most logical to recognize that the tenor of the *protection of commercial interests* approach is different to that of *objective necessity*, as understood by the Commission. Further, the ‘in particular’ caveat could be said to provide a basis for it being recognized as a separate, additional justification. However, if the Commission was to stick religiously to the defences as laid down in the Guidance Paper, then there is a risk that the meeting the competition defence would fail if treated as beyond the scope of the two defences referred to (though such an approach would be worthy of criticism, particularly given the ‘in particular’ caveat). It remains to be seen how the Commission would, post-Guidance Paper, deal with a defence based upon the protection of commercial interests, but given that the CJEU has endorsed it as a possible defence, the Commission would be foolish to dismiss, without due consideration, the defence, if raised.

Ethically speaking, one certainly could quail the existence of a defence of *meeting the competition*. Indeed, Nazzini sees the concept as ‘plainly absurd’, in that it apparently legalizes predation.⁸⁹ This argument is not without merit, but the question of whether or not a defence is desirable is not within the ambit of this article – the important issue for present purposes is which defences are recognized within Article 102 and are, therefore, potentially available in the context of rebates. The discussion above demonstrates that meeting the competition is a recognized objective justification.

II. Economies of scale

Another possible basis for justification which the Commission highlights in the Guidance Paper is that where the rebate system is ‘indispensable to the realisation of those efficiencies’.⁹⁰ In the context of retroactive rebates, this might refer to instances whereby the dominant undertaking needs to operate at a certain level of output in order to realize certain economies of scale, the benefit of which is then passed on to customers. In order to achieve this level of output, great initial investment may be needed, meaning that the discounts cannot be applied from the outset, but can be applied retrospectively, once the economies of scale have been realized. The Commission has previously been clear that ‘[s]uch cost savings need to be substantiated’ and cannot merely be ‘[g]eneral remarks about transaction cost savings or general claims of better production planning’⁹¹ – this justification is therefore not satisfied by spurious *ex post* claims, *but* it certainly can be satisfied by the dominant undertaking who, aware of the *prima facie* prohibition on retroactive rebates, only undertakes such a scheme having analysed and determined the existence and extent of these cost savings. This shows precisely how the qualified *per se* prohibition can provide greater certainty to dominant undertakings. Indeed, an undertaking which could adduce evidence in form of analysis pre-dating the introduction of the rebate would be in a strong position to demonstrate both the existence of indispensable savings, and the requisite causal link.⁹²

The Commission considers, in the context of citing ‘transaction-related cost advantages’ as efficiencies, that ‘incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes’.⁹³ This (unsurprisingly) *implies* a preference for incremental schemes over retroactive schemes, but in no way suggests that retroactive schemes would be incapable of demonstrating such an efficiency.

III. High Fixed Costs

⁸⁹ Nazzini (n 33) 302.

⁹⁰ Guidance Paper (n 27) [30].

⁹¹ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (December 2005) [173]. Although this predates the current Guidance Paper, it is useful for showing the attitude taken by the Commission when consulting in respect proposals for the current Guidance Paper.

⁹² Listed as a precondition in Guidance Paper (n 27) [30].

⁹³ *ibid* [46].

A similar idea to the economies of scale argument is that noted by Colomo,⁹⁴ whereby a retroactive quantity rebate scheme over a short period may be credible in an industry with high fixed costs. In such a circumstance, it would be reasonable to argue that such rebates should not be seen as an infringement under Article 102, and it would be realistic to demonstrate an objective economic justification for the rebates: namely, that the undertaking is keen to provide its customers with reasonable prices, but is unable to do so until the end of the short reference period, because of high fixed costs.

It should be pointed out that, whilst one might reasonably assume that rebates offered by an airline could conceivably be justified on this basis, on the facts of *British Airways* the exponential aspect⁹⁵ of the condition of the rebates suggests that there was no bona fide intention to deal with high fixed costs. Rather, it was an attempt to guarantee increased sales from each customer each year with no necessary correlation to the year-on-year fixed costs: the rebate was ‘calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets, and subject to the agent's increasing its sales of such tickets from one year to the next’.⁹⁶ If a rebate was, instead, based upon a set target volume of sales, and was of a percentage or amount which was unaffected by the extent to which the target is exceeded, then the argument that retroactive rebates was necessary and justifiable, in light of high fixed costs, becomes much more plausible.

D. Interim conclusions

Post Danmark II shifts the treatment of retroactive rebates into the qualified *per se* prohibition rule which has been seen in the context of exclusivity rebates, in *Intel*. This is reflective of the fact that neither kind of rebate is ordinarily justifiable, when used by a dominant undertaking, *but* that certain circumstances can provide a justification (and therefore a *defence*) to the illegality of such a rebate. Nothing precludes an undertaking proving its justifiability, and it is submitted that this approach, whilst taking a harsh standpoint in respect of retroactive rebates, is a desirable development of the law, provided that objective justifications are taken seriously.

This section has explained the different ways in which dominant undertakings can show their rebates, though presumed to be illegal, to be justifiable on the facts. It has also been shown that the Commission is cognisant of such justifications. The goal has not been to explain how these justifications fit into the current binary structure of the defence – the prospect of additional objective justifications is clearly accepted by the CJEU in *Post Danmark I* (via the ‘in particular’ caveat), thus taxonomy is (if anything) merely a superficial issue. The issue is that, whilst the Guidance Paper and the jurisprudence of the Courts point to certain possible justifications, there are no examples of their successful pleading by a dominant undertaking. This does not mean that the objective justifications are virtually unavailable, but does show that, on the facts of the previously cited Decisions and cases, the Commission and the Courts did not deem a justification to have existed. This is not problematic for my argument – I have simply submitted that the qualified *per se* rule is justifiable if objective justifications are taken seriously: I have not claimed that previous adjudications regarding objective justifications have been mistaken (unfortunately, there is no space in this article for such a discussion). As such, my argument that objective justifications must be taken seriously is prospective, because we have not yet seen a factual scenario which yields these justifications.

⁹⁴ Pablo Ibáñez Colomo, ‘AG Kokott in *Post Danmark II*: a legal test for quantity rebates’ (*Chilling Competition*, May 2015) <<https://chillingcompetition.com/2015/05/28/ag-kokott-in-post-danmark-ii-a-legal-test-for-quantity-rebates/>> accessed 21 September 2016.

⁹⁵ See section 2(C) above.

⁹⁶ *British Airways* (n 19) [4].

5. Remaining questions

The CJEU's judgment in *Post Danmark II* had important impacts on the treatment of retroactive rebates, the relevance of the as-efficient-competitor test, and the requisite likelihood of exclusionary effect in order to find an Article 102 infringement. The primary interest in this article has been the impact on retroactive rebates, not just because *Post Danmark II* indicated a convergence in the CJEU's approach to rebates which can be seen as presumably abusive, but also because it is this aspect of the judgment which might be further developed in the near future. The *Intel* appeal will afford the CJEU an opportunity to deal with some unresolved issues which arise from *Post Danmark II*, either because they were not squarely addressed by the judgment, or because the effects of the judgment may be of interest in *Intel*.

An issue that was *not* squarely addressed by the CJEU in *Post Danmark II* is the three-fold classification which the General Court used in *Intel*, and which seems to be supported by prior case law. As it has been noted, Sidiropoulos had little doubt as to the confirmation of this classification,⁹⁷ but I have already suggested that the endorsement of the three-fold classification was equivocal. Furthermore, it is worth noting that AG Kokott's opinion claimed it to be 'ultimately immaterial whether the scheme can be assigned to a traditional category of rebate', with the important issue being 'whether the dominant undertaking grants rebates which are capable of producing on the relevant market an *exclusionary effect* which is not economically justified'.⁹⁸ The CJEU did not deal with this claim in *Post Danmark II*, but it is submitted that the qualified *per se* prohibition that flows from the case suggests an approach that treats retroactive rebates and exclusivity rebates in the same manner – as such, the CJEU may, in the *Intel* appeal, reconsider the three-fold classification, either by moving to a two-fold classification, or by placing exclusivity rebates and retroactive rebates in the same category and retaining a residual category. In light of the lack of clarity as to the CJEU's view on the three-fold classification, *Intel* will surely provide an inescapable opportunity for a clear view on the General Court's category-based approach to be given by the CJEU. It must be noted that the classification will *not* dictate the outcome in *Intel* – the significance of objective justifications postulated by this article is, it is submitted, a more important issue for the purposes of the outcome, given that the starting point is essentially of a presumption of illegality.

The rebates in *Intel* were generally exclusive,⁹⁹ thus the position of retroactive rebates is unlikely to be developed greatly from that which follows from *Post Danmark II*. However, it is possible that, depending on the CJEU's evaluation of the three-fold classification approach, the uniform approach recognized above might become more clear. That is, if the CJEU was to show itself to be more concerned with, as AG Kokott proposed, the likely effect of the rebates, rather than their categorisation, then it is possible that the judgment will shed light on the CJEU's views on exclusivity rebates in comparison to retroactive rebates.

6. Rebates post-Post Danmark II

The *Post Danmark II* judgment was significant in a number of ways, and this article has focused predominantly on one such way: the tightening of the approach to retroactive rebates, and indications of convergence with the treatment of exclusivity rebates. Undoubtedly, there remain differences between the two approaches, but this article has argued that the CJEU has recognized, in *Post Danmark II*, that retroactive rebates offered by a dominant undertaking will typically be anticompetitive, and that whilst an effects-analysis is allegedly necessary, the almost inevitable result of that analysis is that such a rebate scheme is an infringement of Article 102. In that respect, there is much less that separates retroactive rebates from exclusivity rebates, and retroactive rebates appear to

⁹⁷ Sidiropoulos (n 46).

⁹⁸ *Post Danmark II* (n 1), Opinion of AG Kokott, [29]

⁹⁹ This is subject to the minor exception of the rebates conditional upon 80% or 95% custom, which were still greatly conducive to fidelity.

be subject to a qualified *per se* rule. This results in a simpler and clearer approach, but is only justifiable insofar as objective justifications are sufficiently available as a defence and thoroughly considered by the Commission and the Courts. This article has sought to show how justifications for retroactive rebates can be demonstrated and should be recognized by the Commission.