



# Intel, Consequentialist Goals and the Certainty of Rules: The Same Old Song and Dance, My Friend

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*Intel*, Consequentialist Goals and the Certainty of Rules:  
The Same Old Song and Dance, My Friend

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The GC's judgment in *Intel* is seen as either a significant step backward for an approach to competition policy that sees the protection of consumer surplus as its overarching goal; or as a vindication of a form of rule-based reasoning which ensures greater certainty in the application of antitrust rules. In the first section of this paper I discuss a tension between goal-oriented and rule-based systems. This tension is illustrated by a schism in utilitarianism. Should bringing about a desired end be the sole good, or should one develop a code of rules to bring about that end? The parallel here to antitrust is evident, and the 'song and dance' we see with *Intel*, is merely a new version of what we have seen before. The third section of this paper looks at *Intel* in this context. There, the Court appears holds that certain rules must be followed, irrespective of the particular effects that the practice in question may bring about. This sort of deontological (or 'formalistic') reasoning suggests that there are certain practices, which if generally followed will maximise consumer welfare. Further, the promulgation of rules adds ex ante certainty and predictability, satisfying rule of law concerns. The paper concludes with an evaluation of the Court's approach in *Intel*. I suggest the Court's approach represents a workable step forward for the enforcement of EU competition law. While the Commission's desire to promote consumer welfare may be laudable, the achievement of the goal needs to be done through a system which provides the needed ex ante certainty for decisions to be predictably made in a workable legal system.

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The General Court's judgment in *Intel*<sup>1</sup> has polarised the European antitrust community. It is seen as either a significant step backward for an approach to competition policy which sees the protection of consumer surplus as its overarching goal;<sup>2</sup> or as a vindication of a form of rule-based reasoning which ensures greater

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<sup>1</sup> Case T-286/09 *Intel Corp v Commission* (ECLI:EU:T:2014:547, 12 June 2014)

<sup>2</sup> See e.g. James S Venit, 'Case T-286/09 *Intel v Commission*—The Judgment of the General Court: All Steps Backward and No Steps Forward' (2014) 10 *European Competition Journal* 203, Patrick Rey and James S Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015) 38 *World Competition* 3, Luc Peepkorn, 'Conditional Pricing: Why the General Court is Wrong in *Intel* and what the Court of Justice can do to Rebalance the Assessment of Rebates' (2015) *Concurrences* No 1-2015 pp 43 – 63, Damien Geradin, 'Loyalty Rebates after *Intel*: Time for the European Court of Justice to Overrule *Hoffman-La Roche*' forthcoming in (2015) 11 *Journal of Competition Law & Economics*, Brian Sher, 'Keep Calm—Yes; Carry on—No! A Response to Whish on *Intel*' (2015) 6 *Journal of European Competition Law and Practice* 219.

certainty in the application of antitrust rules and the administration of antitrust policy.<sup>3</sup> As one commentator notes, this debate has taken on an emotional tone uncommon in EU scholarship.<sup>4</sup>

The focal point giving rise to this split within the antitrust community is the General Court's apparent reluctance to adopt (or—depending on the commentator's perspective—abandonment of) an effects-based form of reasoning. Rather, in its decision in *Intel*, the Court attempts to advance the goals of EU competition policy through the promulgation of, and adherence to, reasonably defined rules to govern a dominant undertaking's conduct on a market.

Underlying the dispute is a divergence of views as to how to best put into practice an effective competition regime. In particular, assuming this regime is to advance one or more goals, there are two *prima facie* means of implementation. First, the regime can focus only on that goal, permitting practices which are consistent with the goal in question and prohibiting practices which frustrate that (those) goal(s). Alternatively, the regime can advance the goal by the promulgation of (and adherence to) a set of rules. This set of rule is in turn designed to ensure that the competition goal will be achieved if those operating in the market adhere to this set of rules.

In this article I explore this divergence of views regarding 'best practices' for implementation and how the *Intel* decision has accentuated these differences. My argument is that that there is an irreconcilable tension between consequentialist systems (i.e. those which determine the appropriateness of an outcome is based strictly on the consequences or effects of that outcome) and deontological systems (i.e. those which determine the appropriateness of an outcome is based on the outcome resulting from adherence to a rule). To the extent that the implementation of competition objectives can be effected by one method, proponents of the other will feel aggrieved.

Yet this antitrust tension that is not a new phenomenon. Moral philosophers, particularly Utilitarians, who seek to advance a particular good as a moral objective, have felt the same concerns. (Given the historical connection between early utilitarianism and nineteenth century economics, the irony of this utilitarian connection is significant.) Indeed, this schism in utilitarianism (dating from the 1861 publication of J S Mill's *Utilitarianism*) precisely parallels the present schism in European antitrust. Utilitarians regard an act to be good in proportion to the amount of utility (e.g. happiness) it brings about. However, this raises a practical issue for the utilitarian: should the actor focus on the effects of her act and chose only that act which brings

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<sup>3</sup> See e.g. Wouter P J Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37 *World Competition* 405 and Richard Whish, '*Intel v Commission*. Keep Calm and Carry On!' (2015) 6 *Journal of European Competition Law and Practice* 1. See also: Pablo Ibáñez Colomo, '*Intel* and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' LSE Law, Society and Economy Working Papers 29/2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2530878](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530878) and Paul Nihoul, 'The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?' (2014) 5 *Journal of European Competition Law and Practice* 521

<sup>4</sup> Nicholas Petit, '*Intel*, Leveraging Rebates and the Goals of Article 102 TFEU,' (2015) 11 *European Competition Journal* 26, at 27.

about the greatest aggregate utility? Or, in the alternative, should she adhere to a system of rules, which—if adhered to by all and over a period of time—will maximise aggregate utility?

The parallel here to antitrust is evident: should a system designed to maximise consumer welfare focus solely on that goal alone (i.e. a consequentialist or an ‘effects-based’ system) and eschew adherence to general rules (or at minimum create exceptions—perhaps on an ad hoc basis—to these rules). Or should it require the adherence to certain rules and thereby bring with it a degree of certainty (a deontological approach which is often referred to as ‘formalistic’). It is this parallelism that I explore in the present article.

My argument is that there is a fundamental dichotomy between goal-orientated and rule-based reasoning. This has been made evident in the philosophical literature, particularly in decades-old controversies among Utilitarians. I contend that a pure effects-based system in antitrust (or any other legal regime, for that matter) will be unworkable. While it may achieve the goal of enhancing a given outcome, it will do so through a sacrifice of ex ante certainty. (The ethicist knows that this is an old observation.) I consider the *Intel* result against this background, and argue that the Court’s reasoning is a very workable outcome for the implementation of EU competition law, given that—inter alia—the Court’s approach does provide for a needed element of ex post certainty. And that given ex ante certainty is a necessary rule of law consideration, abandoning such certainty is unpalatable.

This article is divided into three parts. In parts one and two, I explore the act/rule utilitarian and the effects-based/formalistic approaches to utilitarian and antitrust reasoning, respectively. The ‘song and dance’ we see regarding *Intel*, is merely a new (or ‘cover’) version of the ‘same old song and dance’ we have seen before. Accordingly, the insights gleaned from this original song and dance can be used to illuminate the antitrust dispute.

In the third, and longest, part of this I examine the *Intel* case in this context. In *Intel*, the limits to legal certainty achieved by rule following have been circumscribed. For instance, the Court rejects the need for the Commission to prove ‘in economic terms’ the harm of the activities in question (thus exclusively focus on a particular outcome). Rather, the Court holds, there are certain rules which must be followed, irrespective of the particular effects which the practice in question can be proven to bring about. This sort of deontological (or ‘formalistic’) reasoning suggests (or is motivated by a belief) that there are certain practices, which if generally followed will maximise (or at least will have a tendency to maximise) consumer welfare.

I conclude with an evaluation of the Court’s approach in *Intel*. I suggest that in spite of the same old criticisms to the contrary, the Court’s approach represents a workable step forward for the enforcement of EU competition law. It is also an implicit rejection of an exclusively effects-focused orientation to this sort of enforcement such as that

advocated by the Commission in its Guidelines.<sup>5</sup> While the Commission's desire to promote consumer welfare may be laudable, and even if it is the sole goal of European competition law, it must be achieved through a system which provides needed ex ante certainty and predictably required for a workable legal system.

## 1. THE PLACE OF RULES IN A GOAL-ORIENTED SYSTEM

First published in 1861 and written in the intellectual climate which gave rise to the development of early economic thought,<sup>6</sup> John Stuart Mill's *Utilitarianism*<sup>7</sup> is traditionally viewed as the starting point for the rule/results tension of the utilitarian tradition. Utilitarianism is the doctrine that acts are right to the extent that they produce utility and wrong to the extent that they produce its opposite.<sup>8</sup> 'Utility' is variously interpreted, such interpretations ranging from Bentham's view that it is pleasure,<sup>9</sup> to J.S. Mill's interpretation of it as happiness,<sup>10</sup> and more modern interpretations of it as desire satisfaction.<sup>11</sup>

At this point, a distinction between act utilitarianism (AU) and rule utilitarianism (RU) should be drawn. AU holds that *acts* are right or wrong by virtue solely of their production of aggregate utility: the right act is that act which maximises aggregate utility.<sup>12</sup> RU holds that aggregate utility is maximised through the adherence to a set of moral rules.

In describing how an adherent to his views ought to act, Mill makes some remarks which indicate that the outcome of a particular action determines its rightness in the moral sense.<sup>13</sup> Thus read, Mill's position is AU. Yet he also makes the following claim:

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<sup>5</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C-45/7

<sup>6</sup> It should be noted that Mill's 1848 work *Principles of Political Economy* (London: John W Parker) was the canonical economics text of the latter half of the Nineteenth Century, replaced by Alfred Marshall *Principles of Economics* (Macmillan, 1890) in the post-World War I era.

<sup>7</sup> First published in 1861 as a series of articles in *Fraser's Magazine*, in 1863 it was published in its entirety as *Utilitarianism* (London: Parker Son and Bourn). References are to the authoritative edition: John Stuart Mill *Collected Works Volume X: Essays on Ethics Religion and Society* (J M Robson ed) (U Toronto Press, 1969).

<sup>8</sup> See *ibid* p 210. The view that utilitarianism promotes 'the greatest good for the greatest number of people' is an anti-utilitarian caricature of the position: this caricature contains an inherent ambiguity of what is to be maximized (the quantity of good or the set of individuals over which the good is maximized).

<sup>9</sup> Jeremy Bentham *Principles of Morals and Legislation* (1789), Ch IV

<sup>10</sup> Mill *Utilitarianism* (n 7) pp 201, 211 – 221

<sup>11</sup> R M Hare *Moral Thinking: Its Levels, Method, and Point*, (OUP, 1981) and Raymond G Frey *Interests and Rights: The Case Against Animals* (OUP, 1980)

<sup>12</sup> The maximization of aggregate utility is a common (albeit later Twentieth Century) formulation of the principle of utilitarianism.

<sup>13</sup> See e.g. Mill *Utilitarianism* (n 7) p 259: "[J]ustice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxim\_ of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner."

“... utility, the interest or happiness of some few persons, is all he [the Utilitarian] has to attend to. Those alone the influence of whose actions extends to society in general, need concern themselves habitually about so large an object. In the case of abstinences indeed—of things which people forbear to do, from moral considerations, though the consequences in the particular case might be beneficial—it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class which, if practised generally, would be generally injurious, and that this is the ground of the obligation to abstain from it.”<sup>14</sup>

This and other passages<sup>15</sup> have been interpreted<sup>16</sup> to hold that Mill is advocating a more subtle ethical position being some form of RU.

The latter view suggests that while maximising aggregate utility serves as the ultimate goal of the moral endeavour, this can be facilitated by following a series of rules, which promote the attainment of the overall goal.<sup>17</sup> Interpreted in this way, Mill is suggesting that rules are a necessary feature of any ethical system.<sup>18</sup>

This point has given rise to two interpretations<sup>19</sup>: one, an account of the normative significance of the act; the other, an account of the nature of reasoning or decision-making when faced with a choice. These are:

*The Normative Account:* An act is good (or right) if it is done in accord with a rule, and this rule if generally followed, will (over time) maximise aggregate utility.

*The Reasoning Account:* To facilitate the goal of maximisation of aggregate utility we should follow a set of rules which, if generally adhered to (over time) will achieve this goal.

The difference between these two is that with the normative account an act obtains its normative significance (moral correctness) in virtue of it being in accord with the rule.<sup>20</sup>

<sup>14</sup> Mill *Utilitarianism* (n 7) p 220

<sup>15</sup> See *ibid*, pp 224 – 5 quoted below (notes 17 and 18)

<sup>16</sup> Most notably by J O Urmson, ‘The Interpretation of the Moral Philosophy of J S Mill’ (1953) 3 *Philosophical Quarterly* 33

<sup>17</sup> See Mill *Utilitarianism* (n 7) p. 224: “But to consider the rules of morality as improvable, is one thing; to pass over the intermediate generalizations entirely, and endeavour to test each individual action directly by the first principle, is another. It is a strange notion that the acknowledgment of a first principle is inconsistent with the admission of secondary ones. To inform a traveler respecting the place of his ultimate destination, is not to forbid the use of landmarks and direction-posts on the way.”

<sup>18</sup> *Ibid* p 225: “Whatever we adopt as the fundamental principle of morality, we require subordinate principles to apply it by: the impossibility of doing without them, being common to all systems, can afford no argument against any one in particular: but gravely to argue as if no such secondary principles could be had, and as if mankind had remained till now, and always must remain, without drawing any general conclusions from the experience of human life, is as high a pitch, I think, as absurdity has ever reached in philosophical controversy.”

<sup>19</sup> See e.g. R Eugene Bales, ‘Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?’ (1971) 8 *American Philosophical Quarterly* 257

<sup>20</sup> From a historical perspective, it should be noted that the normative account explicitly features in John Austin’s *The Province of Jurisprudence Determined*, originally published in 1832, see Lecture II: “Trying to collect its tendency (as its tendency is thus understood), we must not consider the action as if it were single and insulated, but must look at the class of actions to which it belongs.” John Austin *The Province of Jurisprudence*

With the reasoning account, the purpose of the rule is to serve as a guide (or, in Mill's words, a 'direction-post') to the desired moral outcome.

The reasoning account of the place of rules in a consequentialist system has its appeal. The idea of using a set of rules which when followed will advance the goal (here, maximising aggregate utility) has significant value for practical action. Many activities are trivial (should I take my coffee break now, or in five minutes?), and hence calculating the optimal outcomes for all choices is impractical. Likewise, the difficulty of calculating consequences of even daily tasks and their alternatives is significant.<sup>21</sup> Accordingly, the use of rules such as 'keep your promises,' 'don't tell lies,' and 'rescue drowning children from small ponds whenever it is safe to do so'<sup>22</sup> will not just be easy to use and follow, but are also productive of the desired outcome over the long run.

However, to AU, the immediate difficulty with both accounts is that so long as a consequentialist outcome is the exclusive goal of the ethical system, rules become redundant. As such, any *adequate* rule-based system collapses into a system that exclusively pursues the consequentialist outcome without the mediation of any rules. Or, in the jargon of the philosopher, RU is extensionally equivalent to AU.

The argument is simply this: If a rule (or set of rules) is designed to be productive of an overall goal, it will admit of exceptions<sup>23</sup> when following the general rule is not productive of achieving the overall goal.<sup>24</sup> Thus, for instance, the general prohibition against lying should include exceptions which, for example, may permit lying to a potential murder regarding the whereabouts of the intended victim.<sup>25</sup> This argument tells against both the normative account and the reasoning account of rules.

If, on the other hand, the rule (or set of rules) does not provide for this sort of exception, the rule (or system) would deem a particular act to be of value precisely because it accorded with a particular rule *in spite of the fact that the act does not advance the very goal that the rule (or system) was designed to promote*. In such circumstances, to follow the rule is counterproductive. Indeed following rules in these circumstances has been

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*Determined* (Wilfred E Rumble ed) (CUP, 1995) p 42. Mill attended Austin's lectures when he was a student at UCL.

<sup>21</sup> See on this point Bales (n 19) at 257 – 8 and also J J C Smart, 'An Outline of a System of Utilitarian Ethics' in J J C Smart and Bernard Williams (eds) *Utilitarianism: For and Against* (CUP, 1973) pp 43 – 45

<sup>22</sup> This example is used in the literature to show the difficulty with predicting the future consequences of a given act. Suppose the rescued child grows up to be a genocidal tyrant, in which case arguably rescuing him may have been wrong: see e.g. J J C Smart, 'Extreme and Restricted Utilitarianism' (1956) 6 *Philosophical Quarterly* 344, 352.

<sup>23</sup> Or in the case of a set of rules, the set will contain a superior rule, which will provide for exceptions

<sup>24</sup> In the words of Smart, 'Outline' (n 21) pp 10 – 11: 'Suppose than an exception to a rule R produces the best possible consequences. Then this is evidence that the rule R should be modified so as to allow this exception. Thus we get a new rule of the form 'do R except in circumstances of the sort C.' That is, whatever would lead the act-utilitarian to break a rule would lead the ... [strict] rule-utilitarian to modify the rule. Thus an adequate rule-utilitarianism would be extensionally equivalent to act-utilitarianism.' As Smart notes, this argument was first made in David Lyons *Forms and Limits of Utilitarianism* (OUP, 1965).

<sup>25</sup> Immanuel Kant *The Metaphysics of Morals* (Mary Gregor trans)(CUP, 1991) pp 57 – 58

pejoratively termed ‘rule worship.’<sup>26</sup> The parallel insult in European competition law might be ‘formalism.’

An extension of this argument is that any ex ante certainty that a rule may provide is significantly diminished. Given that when a greater good can be obtained by not following a rule than following the rule, there can never be any certainty that rules will be followed (or, more appropriately, that the conduct of others can be anticipated to follow rules).

This excursion into ethics has provided us with two lessons, the one methodological, the other historical. The methodological lesson is by far the most significant. This is the realisation that rules are redundant to a system which has as its sole objective the promotion of an outcome. Achieving the goal is the outcome of the regime consequently if that regime adopts any rules; those rules adopted will be such that they are to be set-aside in circumstances where adherence to them will not promote the goal of the regime. The historical lesson is much simpler: namely, to the philosopher, this is an old dispute: of the references in the philosophical literature cited above, the most recent is from 1973!

## 2. RULES, GOALS AND ANTITRUST

While it may be significant in the rarefied world of the philosopher, the resolution of (or the impasse resulting from) the act/rule utilitarian schism means little to the rest of us. However, in the real world of antitrust regulation, the parallels to that schism are significant. Decisions and investments are made or foregone depending on how the parties predict the antitrust authorities will view and reason about the proposed arrangement. Similarly, consumer welfare will be enhanced to the extent that (i) the antitrust authorities’ response (which in turn is governed by means chosen to facilitate this goal), (ii) the parties’ prediction of the authorities’ response, and (iii) the means chosen by the antitrust authorities to pursue the goal of choice (consumer welfare) all faithfully pursue the chosen goal.

In this section I examine the predicament faced by those interpreting or administering antitrust systems. This predicament precisely parallels the utilitarian predicament. A system that has its sole objective the furtherance of a particular goal (i e which is consequentialist) must do so without the use of binding rules. It also must therefore at least implicitly reject the ex ante certainty that such rules provide. On the other hand a system which follows rules (i e which is deontological) may frustrate the achievement of goal-oriented objective by the apparent (and dogmatic) adherence to a rule.

However, antitrust regimes have additional considerations which are not faced by ethical systems. These are the same considerations faced by any acceptable legal regime, and include so-called ‘Rule of Law’ considerations, which include the need for predictability which includes the desirability of general rules (thus militating ad hocery),

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<sup>26</sup> See e.g. Smart, ‘Outline’ (n 21) p 10. See also Smart, ‘Extreme and Restricted Utilitarianism’(n 22) at 353 where he argues that in these circumstances (for the consequentialist) there is no good reason to abide by the rule.



the need for the rules to be understandable and congruence between the rules as written and administered.<sup>27</sup> These considerations come into play whether the goal that the legal regime pursues is consequentialist or is informed by other objectives, which are not readily subject to quantification. These rule of law considerations serve as constraints or limits to the means by which a particular legal policy can be advanced by the legal system. These limits apply to all policies, irrespective of whether the goal to be advanced can readily be quantified (such as an effects-based policy, where the effects readily quantified, e.g. consumer surplus in an antitrust regime) or not (in contrast to a more ideals-driven policy, e.g. the recognition of the equality of persons through non-discrimination programmes).

The literature has identified a number of goals which may underlie European competition policy.<sup>28</sup> Broadly speaking, these can be divided into welfare goals (which can be readily quantified) and as such are the focuses of consequentialist-based antitrust policies. The other sorts of goals (that are not subject to such ready quantification) are the subject to a more deontological approach to competition law.<sup>29</sup>

These non-welfarist goals include<sup>30</sup> concerns such as protection of the competitive process and/or a competitive market structure,<sup>31</sup> the advancement of economic freedom<sup>32</sup> (held by some to reflect an ordoliberal ideal of the market<sup>33</sup>), notions of fairness,<sup>34</sup> the protection of competitors and SMEs,<sup>35</sup> market integration,<sup>36</sup> market

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<sup>27</sup> This list is, of course, taken from among Fuller's necessary conditions for law. See Lon L. Fuller *The Morality of Law* (Yale U.P., 1963; revised edn 1969) p. 39.

<sup>28</sup> See the enumeration in Renato Nazzini *The Foundations of European Union Competition Law: The Object and Principles of Article 102* (OUP, 2011) pp. 11–50, also Petit (n. 4) mentions several of these. See, more generally, Daniel Zimmer (ed) *The Goals of Competition Law* (Edward Elgar, 2012). Peepkorn (n. 2) suggests that in its appellate judgment *Intel* it would 'be helpful, even necessary, for the ECJ to confirm the position taken in *Post Danmark* that the goal of EU competition law is to protect competition for the benefit of consumers and that its aim is not to protect competitors against competition' (para. 113). Note Peepkorn's use of the definitive article, implying that there is a unique goal to EU competition law.

<sup>29</sup> This consequentialist/deontological analysis of the aims of competition law and policy is explored by Oles Andriychuk, 'Rediscovering The Spirit of Competition: On the Normative Value of the Competitive Process' (2010) 6 *Competition Law Review* 575.

<sup>30</sup> This enumeration is based on Nazzini's exposition, *ibid.*

<sup>31</sup> See e.g. Case C-95/04 P *British Airways v Commission* [2007] E.C.R. I-2331, paras 103–108 and Opinion of AG Kokott (23 February 2006), para. 68; Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] E.C.R. 215, para. 26.

<sup>32</sup> This is a well-known ordoliberal position, see generally Daniel Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, 1998), cf. Pinar Akman, 'The Role of 'Freedom' in EU Competition Law' (2014) 34 *Legal Studies* 183 for a view that there is little support for the view that economic freedom plays a significant role in EU competition law.

<sup>33</sup> See e.g. Gerber, *ibid.*, cf., however, Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 *Oxford Journal of Legal Studies* 267 who rejects the argument that this is (or was) a goal of EU competition law.

<sup>34</sup> See generally Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart, 1997), see also Bruce Wardhaugh *Cartels Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (CUP, 2014) pp. 44–48.

<sup>35</sup> Laura Parret, 'The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives' in Zimmer (n. 28) pp. 61–82, at 72–3.

liberalisation,<sup>37</sup> and consumer choice.<sup>38</sup> These goals—while ultimately seeking a result—are somewhat less amiable to quantification than the other set. Accordingly, these goals are difficult to maximise with the same precision as the welfarist goals.

At an intuitive level, one may be able to discern which of two states of affairs is a ‘more competitive’ or ‘liberal’ market. But a ranking of states of affairs is different from quantifying a value (e.g. ‘liberalisation’ of a market). In addition, implementing policy choices designed to maximise these goals, and others such as consumer freedom, market integration or other ideals-driven policies is—given the intrinsic difficulties in quantification—a qualitatively different matter. Indeed, given such difference, effects-based reasoning is seemingly inappropriate to the evaluation and promotion of these goals.

The welfare goals concern the promotion of consumer (or possibly total)<sup>39</sup> welfare. The Commission’s recent approach had been to put consumer welfare to the front of their enforcement priorities in Article 102 matters.<sup>40</sup> This is consistent with its approach to Article 101<sup>41</sup> and merger matters.<sup>42</sup> Consumer and total welfare are well subject to quantification. Since the work of Marshall,<sup>43</sup> textbooks have included diagrams, formulae and equations which show the increase and decrease of producer and consumer surplus under changes in market conditions.

The pursuit of welfarist goals in antitrust is in every significant way identical to the utilitarian’s pursuit of maximum aggregate utility. A quality—whether utility or consumer/total surplus—is to be maximised. To achieve this maximisation, the legislator’s or adjudicator’s mind will be either exclusively focused on the goal (welfare maximisation) or will use rules, which if generally adhered to, will achieve that goal.

The same utilitarian tensions arise. First, if the goal is all that matters, rules are redundant. Second, if the legislator or (more likely the) adjudicator follows a rule (or continues the perpetuation of such rule-bound conduct) in spite of the fact that not

<sup>36</sup> See e.g. Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited, v Commission* [2009] E.C.R. I- 9291, paras 61 – 63, Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] E.C.R. 1, Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1996] E.C.R. (English Special Edn) 299, 340.

<sup>37</sup> See the discussion in *Nazzini* (n 28) pp 29 – 30

<sup>38</sup> Paul Nihoul, ‘Freedom of Choice—The Emergence of a Powerful Concept in European Competition Law’ available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2077694](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694)

<sup>39</sup> See e.g. Ioannis Kokkoris and Rodrigo Olivares-Caminal *Antitrust Law Amidst Financial Crises* (CUP, 2010) pp 103 – 258, *Nazzini* (n 28) pp 32 – 49, this build on the work of Oliver E Williamson, ‘Economies as an Antitrust Defense: The Welfare Tradeoffs’ (1968) 58 *American Economic Review* 18 and Oliver E Williamson, ‘Economies as an Antitrust Defense Revisited’ (1977) 125 *University of Pennsylvania Law Review* 699

<sup>40</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 [2009] OJ C-45/7, points 5 – 7

<sup>41</sup> Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C-101/97, point 13

<sup>42</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C-31/5, point 8

<sup>43</sup> Marshall (n 6) at e.g. 463 – 69

following (or rejecting) the rule would—in the instant case—be productive of greater welfare, then such a person is open to the charge of being a ‘rule worshiper’ or—in the legal vernacular—a ‘formalist.’

But in legal reasoning, there is an additional layer of complexity which is added by the necessity of rule of law considerations. Rules, with their *ex ante* certainty, provide for the predictability, lack of *ad hocery*<sup>44</sup> and consistency<sup>45</sup> through time necessary for a legal system to be both workable and acceptable as a system of laws. As noted above, these considerations should be seen as necessary limits to goal-maximisation, rather than being objects of derision or scorn. The complexity is again intensified when the goal-driven outcome is one of a number of goals (some of which are not subject to such precise quantification) in a legal regime. It is thus no surprise that those most critical of the General Court’s decision in *Intel* are advocates of the effects-based approach to EU competition policy. However, as will be seen in the next section, the General Court’s reasoning in *Intel* is in a very relevant way, an instance of the implementation of a possibly multi-goaled regime, which among its goals includes a goal-driven policy, yet at the same time recognises the efficacy and normative necessity of underlying rules.

### 3. *INTEL*, COMPETITION GOALS AND LEGAL REASONING

My focus in this section is on the General Court’s decision in *Intel*. In particular, I examine that decision in regard to its use of goal-focused and rule-based reasoning. I do this in an effort to determine the extent that the Court’s approach *in this case* represents a step forward (or backward) in establishing a method of legal reasoning to aid the enforcement of European competition law. I should note that I am making claims with respect to the nature of legal reasoning found in the *Intel* decision. I am not making claims about or discussing the case law of Article 102 as a whole (unless I otherwise specifically so state).<sup>46</sup>

In its judgment in *Intel*, the General Court upheld the Commission’s 2009 decision<sup>47</sup> fining Intel €1.06 billion for abusing its dominance<sup>48</sup> in the x86 CPU chip market. The conduct relevant for this article arose as a result of AMD’s (Intel’s main rival) introduction of a new line of faster CPU chips.<sup>49</sup> Intel’s abuse consisted in

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<sup>44</sup> Indeed, it may be suggested that a legal system, by eschewing rules and myopically pursuing a welfare-based goal, would embrace the *ad hocery* anathematical to rule of law considerations.

<sup>45</sup> Consistency and internal coherence are indeed important features of any system which contain more than one simple rule. Such a system must ensure that the mutual application of the rules yields a unique result, otherwise the system is liable to generate contradictory results. Indeed it may be suggested that the EU competition system in fact does generate such results by treating e.g. exclusivity obligations differently from certain forms of rebates and price cuts, when these practices have the same economic effect/commercial result. I am grateful to a reviewer who pointed this out.

<sup>46</sup> And I also wish to make clear that in so discussing 102, I recognize the obvious: that not all potentially abusive practices are subject to a rule.

<sup>47</sup> Decision C(2009) 3726 final of 13 May 2009 relating to a procedure under Article 83 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990—Intel)

<sup>48</sup> During the relevant timeframe, Intel held a 70% or greater market share: T-286/09 *Intel*, para 25

<sup>49</sup> Intel Decision (n 47) recitals 150 – 159

‘implementing a strategy aimed at foreclosing competitors from the market of x86 CPUs.’<sup>50</sup> The strategy involved granting rebates to its customers (OEMs who would use Intel chips in their computers) conditional on the customer buying all (or nearly all) of their chips from Intel.<sup>51</sup> Additionally, Intel engaged in a practice of granting payments to a distributor conditional on it selling only computers with Intel chips, and paying OEMs to delay or cancel the production of computers using AMD chips.<sup>52</sup>

In its Decision, the Commission<sup>53</sup> characterised the rebates in question as fidelity rebates within the meaning of *Hoffmann-La Roche*.<sup>54</sup> As such, these rebates are abusive, unless exceptional circumstances prevail.<sup>55</sup> The General Court succinctly states the core of Intel’s ground for appeal of the Decision:

“The applicant contests the Commission’s legal characterisation of the payments granted. The applicant maintains in essence that the Commission was required to carry out an assessment of all the surrounding circumstances to see whether the rebates and payments complained of were capable of restricting competition. Before finding that the grant of a rebate is contrary to Article 82 EC, the Commission must prove that those rebates are actually capable of foreclosing competition to the detriment of consumers. Where the conduct is historic, the Commission must prove that the agreements complained of actually led to the foreclosure of competitors.”<sup>56</sup>

The Court rejected these grounds, upholding the Decision in its entirety.

In rejecting Intel’s appeal, the Court made two points of concern to our present task. First, the Court provides a legal taxonomy of rebates. Second, the Court held that at least with regard to the rebates in question in *Intel*, the Commission was under no legal obligation to prove detrimental effects in the market. This latter point is in turn significant. Not only did the Commission devote considerable effort to assessing the effects on the market of these rebates in its Decision<sup>57</sup> (this analysis, in turn, has been considered deficient<sup>58</sup>); but also the demand for such proof of harm before condemnation of a practice underlies any effects-based regime. Indeed, this has been taken as judicial rebuke of a consumer surplus-promoting European competition

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<sup>50</sup> T-286/09 *Intel*, para 35

<sup>51</sup> *Ibid*, paras 28 – 35

<sup>52</sup> Intel also engaged in a practice of granting payments to a distributor conditional on it selling only computers with Intel chips, and paying OEMs to delay or cancel the production of computers using AMD chips: T-286/09 *Intel*, paras 35 and 198.

<sup>53</sup> Decision (n 47) para 1001 (see also paras 922, 950, 981 989 and 1000)

<sup>54</sup> Case 85/76 *Hoffmann-La Roche v Commission* [1979] E.C.R. 461

<sup>55</sup> T-286/09 *Intel*, para 77

<sup>56</sup> T-286/09 *Intel*, para 70

<sup>57</sup> Decision (n 47) recitals 792 – 1640

<sup>58</sup> See e.g. Danmien Geradin, ‘The Decision of the Commission of 13 May 2009 in the *Intel* Case: Where is the Foreclosure and Consumer Harm?’ available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1490114](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490114)

regime.<sup>59</sup> Rather, the Court's analysis focuses on the *potential for harm* to the market which these practices *could* occasion.

The Court's taxonomy of rebates (paragraphs 74 through 78) is based on previous case law.<sup>60</sup> Three categories of rebates are identified. The first category, 'quantity rebates' where the rebate is 'linked solely to the volume of purchases made from an undertaking occupying a dominant position' are generally considered not to have the foreclosure effect prohibited by Article 82 EC.<sup>61</sup> In these circumstances the grant of a rebate can be linked to efficiencies gained in the increase in sales to a particular consumer, with the resulting efficiency savings being passed onto that consumer. Given such efficiencies, this form of rebate is not presumed to be abusive, as *Michelin II* made clear.<sup>62</sup>

The second category of rebates consists of rebates that are conditional on a customer 'obtaining all or most of its requirements from the undertaking in a dominant position.'<sup>63</sup> Such rebates, which the Commission termed 'fidelity rebates,' (Court renamed 'exclusivity rebates'<sup>64</sup>) require the affected undertaking to obtain 'most of its requirements from the undertaking in a dominant position.'<sup>65</sup> These rebates serve to foreclose the market to the dominant undertaking's competitors.

The Court justifies its point thus:

'Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but 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 ... *Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers ...*'<sup>66</sup>

The Court's used of the phrase 'Such rebates are designed...' is noteworthy.

In French (the working language of the Court),<sup>67</sup> the relevant sentence reads, 'En effet, de tels rabais tendent à empêcher, par la voie de l'octroi d'un avantage financier'. The

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<sup>59</sup> In particular *Wils* (n 3) at 408 – 10, *Venit* (n 2) at 206

<sup>60</sup> In particular, Case 85/76 *Hoffmann-La Roche v Commission* [1979] E.C.R. 461, Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] E.C.R. 3461 ('*Michelin P*'), Case T-203/01 *Michelin v Commission* [2003] E.C.R. II-4071 ('*Michelin IP*'), Case C-95/04 P *British Airways v Commission* [2007] E.C.R. I-2331, Case T-155/06 *Tomra Systems and Others v Commission* [2010] E.C.R. II-4361 and C-549/10 P *Tomra Systems and Others v Commission* (19 April 2012: ECLI:EU:C:2012:221)

<sup>61</sup> T-286/09 *Intel*, para 75

<sup>62</sup> T-286/09 *Intel*, *ibid*; see Case T-203/01 *Michelin II*, para 58

<sup>63</sup> T-286/09 *Intel*, para 76

<sup>64</sup> *Ibid*

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*, para 77, emphasis supplied, and the Court's references to case law omitted

<sup>67</sup> This approach, by appealing to the French working language of the Court, is also found in *Petit* (n 4) p 36; however, he notes this methodology "is not a rare feature in the EU legal order" (*ibid* at n 48). Indeed,

relevant phrase could be translated as ‘Indeed, such rebates have the tendency to’.<sup>68</sup> The Court’s concern is thus not with the particular effect a given undertaking’s rebate programme may have on the relevant market in the case in question; rather its concern is a more general one, namely the tendency towards foreclosure that such rebates have in markets in which dominant firms operate.<sup>69</sup> With this in mind, this sort of rebate when granted by a dominant undertaking is, with the caveat ‘save in exceptional circumstances,’ an abuse. The General Court appeals to *Hoffmann-La Roche* and *Tomra* in support of this conclusion.<sup>70</sup>

The third category of rebates, while having a fidelity-building effect, has no direct link to a requirement for exclusive supply. The Court describes this category:

‘Third, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the undertaking in a dominant position, but where the mechanism for granting the rebate may also have a fidelity-building effect (‘rebates falling within the third category’). That category of rebates includes inter alia rebate systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking. In examining whether the application of such a rebate constitutes an abuse of dominant position, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition’.<sup>71</sup>

These rebates are not conditioned on the customer obtaining all or most of its supply from the dominant undertaking. The achievement of individualised sales targets that activate a rebate is the clearest instance of a member of the third category. Such rebates

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appeal to the original language of a document (or working language when the document was composed by a group who may not share the same tongue) is a standard practice in all academic disciplines.

<sup>68</sup> Similarly in German, ‘Solche Rabatte dienen nämlich dazu ...’; ‘Such rebates serve namely to ...’. And in Dutch, ‘Het de afnemers langs de weg van dergelijke kortingen geboden geldelijke voordeel is er immers op gericht te verhinderen dat zij zich bij concurrerende fabrikanten gaan bevoorraden ...’: ‘The customers, by the way of such rebates, are offered a financial advantage which is indeed aimed at preventing them to turn to a rival producer’s supply ...’.

<sup>69</sup> As such, the rendering of the French ‘tendent’ into English using ‘designed’ may be a bit infelicitous, given that the latter term has connotations of intent. The same difficulty appears in the Dutch—but not the German—translation. Note that in C-549/10 P *Tomra*, para s 19 – 21 the ECJ held that abuse is an objective concept and the absence of any intent which can be ascribed to the undertaking is irrelevant to the characterisation of the conduct as abusive.

<sup>70</sup> T-286/09 *Intel*, para 77; Case 85/76 *Hoffman-La Roche*, para 90; T-155/06 *Tomra*, para 209

<sup>71</sup> T-286/09 *Intel* para 78

require analysis prior to their condemnation. The Court relies on *Michelin I*, *British Airways* and *Tomra* to justify this point.<sup>72</sup>

The Commission characterized the rebates granted by Intel to the OEMs as falling into the second category. The Court agreed with this categorization.

The result of this categorization is a three-fold taxonomy of rebates, each governed by a rule of legality. Although the American concepts of per se (il)legality and rule of reason analysis are somewhat inapplicable to the EU context,<sup>73</sup> these well explain the rules of surrounding the legal status of these categories of rebates. Rebates belonging to the first category, quantity rebates, are per se legal. Those belonging to the second, ‘exclusivity rebates,’ are per se illegal, save under ‘exceptional circumstances.’<sup>74</sup> Rebates in the final category (fidelity-building but not dependent upon exclusivity) are subject to a rule of reason type of analysis in which the context and commercial circumstances of the rebate are examined. The practical consequence of this taxonomy is that once a practice has been identified and correctly characterized, a clear line is drawn with respect to its legality. Outside of the third category, there is little room for error; and within that latter category, the scope for such error is constrained.

The second point of importance in the Court’s judgment concerns the need for proof via the use of economic evidence to establish a foreclosure effect of the rebate scheme. In rebate matters, economic evidence—according to the Court—is relevant only for rebates which may be said to belong to the third category. As Intel’s practices fell into the second category, ‘exclusivity rebates,’ economic evidence is irrelevant to establishing their legality.<sup>75</sup> This is because the practices in question are of the sorts which have a general propensity to cause harm.

The theory of harm used by the Court is that of anticompetitive leveraging, which uses rebates to leverage (or tie) a customer’s requirements for the non-contestable share of a particular product to the contestable share. Anticompetitive leveraging is effective only if done by a dominant undertaking. A fortiori, due to the presence of this dominant undertaking, competition in that market is already weakened.<sup>76</sup> In addition, we recall that the European Courts have imposed a duty on dominant firms not to further weaken competitive structures in such markets.<sup>77</sup>

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<sup>72</sup> T-286/09 *Intel* para 78, referring to Case 322/81 *Michelin I*, para 73; Case C-95/04 P *British Airways*, paras 65 and 67; and Case C-549/10 P *Tomra*, para 71

<sup>73</sup> Case T-112/99 *Métropole télévision (M6) and Others v Commission* [2001] E.C.R. II-2459, paras 72 – 80

<sup>74</sup> A significant point is how the ‘exceptional circumstances’ are subject to proof. Presumably this would be through something like a 101(3) defence, by showing that these rebates are efficiency-producing and that customers will benefit as a result of these practices. (See T-286/09 *Intel*, para 94, quoted below n 80.) However if this defence is illusory (due to e.g. insurmountable burden of proof) the rule is thus one of de facto per se illegality.

<sup>75</sup> T-286/09 *Intel*, para 84. However, the irrelevance of economic evidence appears to make any defence illusory.

<sup>76</sup> See e.g. C-549/10 P *Tomra*, para 16

<sup>77</sup> Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] E.C.R. 3461, para 57 (*Michelin I*); Case C-202/07 P *France Telecom v Commission* [2009] E.C.R. I-2369, para 105; and C-209/10 *Post Danmark*, para 23

The Court's observations regarding this special responsibility in the context of anticompetitive leveraging are worth noting:

“That approach is justified by the special responsibility that an undertaking in a dominant position has not to allow its conduct to impair genuine undistorted competition in the common market and by the fact that, where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market (see, to that effect, ...). In that case, the exclusivity of supply causes additional interference with the structure of competition on the market. Thus, the concept of abuse in principle includes any obligation to obtain supplies exclusively from an undertaking in a dominant position which benefits that undertaking (see, to that effect, ...)”.<sup>78</sup>

The Court continues to note that in such circumstances, due to the strong market position of the sort held by undertakings (such as Intel in the present case) there are no substitutes for the dominant firm's products. Accordingly, the dominant firm is an unavoidable trading partner.

The Court then works the consequences of this unavoidable trading into its theory of harm based on anticompetitive leveraging, in paragraphs 92 and 93 of the judgment. These paragraphs merit reproduction:

‘92 It follows from the position of unavoidable trading partner that customers will in any event obtain part of their requirements from the undertaking in a dominant position (‘the non-contestable share’). The competitor of an undertaking in a dominant position is not therefore in a position to compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share (‘the contestable share’). The contestable share is thus the portion of a customer's requirements which can realistically be switched to a competitor of the undertaking in a dominant position in any given period, as the Commission states at ... . The grant of exclusivity rebates by an undertaking in a dominant position *makes it more difficult* for a competitor to supply its own goods to customers of that dominant undertaking. If a customer of the undertaking in a dominant position obtains supplies from a competitor by failing to comply with the exclusivity or quasi-exclusivity condition, it risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate.

93 In order to submit an attractive offer, it is not therefore sufficient for the competitor of an undertaking in a dominant position to offer attractive conditions for the units that that competitor can itself supply to the customer; it must also offer that customer compensation for the loss of the exclusivity rebate. In order to submit an attractive offer, the competitor must therefore apportion the rebate that the undertaking in a dominant position grants in respect of all or almost all of the customer's requirements, including the non-contestable share, to the contestable share alone. Thus, the grant of an exclusivity rebate by an unavoidable trading

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<sup>78</sup> T-286/09 *Intel*, para 90



partner *makes it structurally more difficult* for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, *thus making access to the market more difficult* for a competitor.’ [emphasis supplied]

This is a textbook exposition of the problem.<sup>79</sup>

This exposition shows that it is the *general tendency* of these sorts of retroactive rebates to interfere with the competitive process which is of concern to the Court and underlies its theory of harm. Given that it is a *general tendency* which is the source of harm, the Commission is in no obligation to demonstrate anything more than that the imputed practice falls within the relevant category, for the rebate to be condemned. Yet, the Court leaves open a ‘faint hope clause,’ granting the (at least) theoretical possibility that an undertaking could justify its use of retroactive rebates in the face of countervailing efficiencies.<sup>80</sup> However, as the burden of proof of these countervailing efficiencies rests on the undertaking involved,<sup>81</sup> and no such evidence was produced, the Court did not need to consider this point further. While this ‘faint hope clause’ may well be a mere theoretical possibility, it is similar in form and function to the ECJ’s pronouncements that—for instance—in theory any agreement is capable of benefiting from the provisions of Article 101(3).<sup>82</sup> But in practical terms this might be an extremely difficult threshold to meet.

The Court makes a similar judgment regarding the propensity of a practice to cause a competitive harm when it analysed the naked restrictions which Intel used to hinder or prevent the marketing of products containing AMD’s chips. In particular, Intel made payments to OEMs in the following circumstances:

—first, HP was to direct HP’s AMD-based x86 CPU corporate desktops to small and medium-sized business (SMB) and Government, Educational and Medical (‘GEM’) customers rather than to enterprise business customers;

—second, HP was to preclude its channel partners from stocking HP’s AMD-based x86 CPU corporate desktops so that such desktops would only be available to customers by ordering them from HP either directly or via HP channel partners acting as sales agent; [and,]

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<sup>79</sup> See e.g. Simon Bishop and Mike Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet and Maxwell, Third Edn, 2010) 6-037 – 6-043; Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (OUP, 2011) pp. 228 - 231

<sup>80</sup> T-286/09 *Intel*, para 94: ‘Lastly, it should be noted that it is open to the dominant undertaking to justify the use of an exclusivity rebate system, in particular by showing that its conduct is objectively necessary or that the potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers . . . . However, in the case in point, the applicant has put forward no argument in that regard.’ [The Court’s citation of case law omitted]

<sup>81</sup> This approach is consistent with Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1

<sup>82</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] E.C.R. II-2969, para 233

–third, Acer, HP and Lenovo were to delay or cancel the launch of computers equipped with AMD CPUs.<sup>83</sup>

In assessing this practice, the Court held that contrary to Intel’s argument, it was unnecessary for the Commission to demonstrate that these practices had an anti-competitive effect (in particular, ‘the possibility or probability of foreclosure of competition’) rather than an anti-competitive object.<sup>84</sup>

Additionally, the Court noted with approval that in its Decision, the Commission relied on factors other than merely the anti-competitive object of these practices, in particular the *tendency* that these payments had to restrict competition. In its discussion of this, the Court repeatedly notes that it is the possibility of the restriction of competition which grounds the illegality of the practice, and not the actual effects which the practice has on the market.

I note the following passages in which the Court makes this observation (in each of which, emphasis has been supplied):

Para 211 [the Commission] relied on additional circumstances confirming the *capability of the naked restrictions to restrict competition*, even though reference to such circumstances is not essential in order to characterise them as abusive under Article 82 EC.’

Para 212 ‘That confirms the capability of those payments to restrict competition. In that context, it should be noted that *characterisation of a naked restriction as abusive depends solely on the capability to restrict competition*, and that characterisation *does not therefore require proof of an actual effect* on the market or of a causal link ... .’

Para 216 ‘even if the products concerned by the naked restrictions could not be characterised as new, those circumstances *would not in any way alter the capability of the practices to make access to the market more difficult* for AMD. .... Neither the capability of making access to the market more difficult for AMD nor the anti-competitive object of the naked restrictions depends on whether those restrictions concern a new product of a new undertaking on the market.’

Para 217 ‘...in the event of infringement of the anti-competitive conditions set out in paragraph 198 above provides a sufficient basis on which to conclude that the applicant’s announcements *were capable of inducing* the OEMs concerned to comply with those conditions.’

And finally, in paragraph 218, ‘However, the question whether the naked restrictions implemented by the applicant were capable of restricting competition does not depend on AMD having actually been foreclosed. In order to demonstrate that capability, *proof of an actual effect on the market is not necessary* ... .’

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<sup>83</sup> T-286/09 *Intel*, para 198

<sup>84</sup> *Ibid*, para 210

The Court's concern (echoing the Commission's view) with both the rebate practices and the payments was not with the actual effects these practices had on the market but their *propensity or probability* which these practices have to foreclose the market.<sup>85</sup>

The Court's treatment of the rebates and the payments appears to involve a comparison of these practices against a rule. Accordingly, two types of issues arise. First, for the positive lawyer, the issues are with regard to the content of these rules, and how do they relate to the other rules of the European antitrust regime. The second sorts of issues are of concern to the more critical lawyer, namely those surrounding the acceptability of these rules, in the sense of their propensity to advance or hinder the goals of the antitrust regime. Our concern is with the second set of issues.

At the outset, it should be noted that the rule regarding exclusivity rebates as formulated by the Court, is apparently a *prima facie* rule. That is, it is of the sort that can be set aside, if circumstances merit. The Court makes it abundantly clear that the rule regarding exclusivity rebates has this in paragraph 94 of the judgment.<sup>86</sup> If a dominant undertaking can establish that the foreclosure of an exclusionary rebate scheme is counterbalanced by appropriate efficiencies benefiting consumers, in these (admittedly almost inconceivable) circumstances the scheme could be justified. As formulated, it may well serve the same role in the legal reasoning process as an American-style rule of reason. The apparent flexible nature of the rule is little noticed in that literature critical of the Court's decision.<sup>87</sup>

In contrast, the rule regarding the payment practices is apparently absolute, admitting of no exception. This rule appears to be a specific instance (or a specific application) of the more general rules that a dominant undertaking is under an obligation not to further impair competition on the market (given the distortions which exist as a result of the presence of a dominant undertaking), and that competition by any means other than competition on the merits will further impair such competition. The Court notes:

[I]t must be stated that an undertaking in a dominant position has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the common market (see, to that effect, *AstraZeneca* ... ). The grant of payments to customers in consideration of restrictions on the marketing of products equipped with a product of a specific competitor clearly falls outside the scope of competition on the merits.<sup>88</sup>

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<sup>85</sup> This is also echoed by the Court's consideration of the extraterritorial application of EU competition law to the present case, in paragraph 257: 'That judgment does not therefore require the existence of actual effects on competition in the European Union, but only that it be sufficiently probable that the agreement at issue is capable of having a more than insignificant influence there.' Citing Case T-204/03 *Haladjian Frères v Commission* [2006] E.C.R. II-3779, para 167

<sup>86</sup> See footnote 80 in which the relevant passage is quoted.

<sup>87</sup> Whish (n 3) at 1 – 2 and Wils (n 3) at 426, though not critical of the Court's decision, note this point. But to the extent that such a defence may be illusory, this rule appears less *prima facie* and more absolute. See comments in n 74, above.

<sup>88</sup> T-286/09 *Intel* para 205

The general rule is well established in the case law, as the Court implies through its reference to *AstraZeneca*.<sup>89</sup>

In justifying both of these two rules, the Court refers to the weakened structure of markets in which a dominant firm is operating and the *propensity* for these practices to further erode this structure.<sup>90</sup> There is no explicit appeal to consumer welfare in the *justification* of these rules. The only such appeal is made in the context of providing an *exception* to the rule against exclusivity rebates, as noted above.<sup>91</sup>

At first glance, these two rules appear inconsistent with a consumer welfare approach, and indeed the rule regarding exclusivity rebates is apparently self-contradictory. *Prima facie*, that rule appears to state something to the effect of: ‘practices (such as exclusivity rebates) which further weaken the competitive structure of the market (when such market structure is already weak due to the presence of a dominant undertaking) shall be prohibited, unless they promote consumer welfare.’ The tension, if not apparent contradiction, is exacerbated with the juxtaposition of the rule regarding the payment practices, which admits of no consumer welfare exception.

One plausible resolution of this tension is to regard market structure as a proxy for consumer welfare.<sup>92</sup> This interpretation is consistent with remarks made in the Commission’s Guidelines on Article 101(3),<sup>93</sup> its Enforcement Priorities on Article 102<sup>94</sup> and the ECJ in other matters.<sup>95</sup>

If this interpretation is accepted (even as a working hypothesis), then some sense can be made from the Court’s reasoning in *Intel*. The rule against exclusivity rebates is ultimately<sup>96</sup> justified on the basis that as these rebate schemes are consumer welfare reducing, the prohibition of that practice advances the consumer welfare goal. Where, on the other hand, a particular exclusivity rebate scheme may indeed advance consumer

<sup>89</sup> The relevant paragraphs of Case T-321/05 *AstraZeneca v Commission* [2010] E.C.R. II-2805 (352 – 355) cite Case 85/76 *Hoffmann-La Roche v Commission* [1979] E.C.R. 461, para 91; Case C-62/86 *AKZO v Commission* [1991] E.C.R. I-3359, para 69; Case T-228/97 *Irish Sugar v Commission* [1999] E.C.R. II-2969, para 111; and Case T-203/01 *Michelin v Commission* [2003] E.C.R. II-4071, para 54

<sup>90</sup> See text accompanying notes 64 – 67, 76 – 82 and 87.

<sup>91</sup> See text accompanying notes 83 – 84.

<sup>92</sup> See e.g. Peter Behrens, ‘The Test for Legality under EU Competition Rules: What Guidance Do the Commission’s Guidelines Provide?’ (2013) Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No 2/13, (available at: [https://europa-kolleg-hamburg.de/fileadmin/user\\_upload/documents/Discussion\\_Papers/1302\\_DP-Behrens.pdf](https://europa-kolleg-hamburg.de/fileadmin/user_upload/documents/Discussion_Papers/1302_DP-Behrens.pdf)) p 12: ‘In the end, competition based on *competitor’s rivalry* in terms of competition on the merits and on *consumer’s choice* is probably the best available proxy for consumer welfare.’ The reference to C-52/09 *Telia Sonera*, para 28 is omitted. It is not the purpose of the present article to conclusively argue for this point, but I merely raise it as a means to reconcile the tension in the two principles indicated by the Court. Indeed, to the extent that this suggestion mitigates the tension in *Intel*, it provides evidence for the proof of this point.

<sup>93</sup> Guidelines on the application of Article 81(3) of the Treaty (n 41)

<sup>94</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 (n 40)

<sup>95</sup> Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal* (NYR 14 March 2013, ECLI:EU:C:2013:160), paras 46 and 48.

<sup>96</sup> Via the mediate step of the effects on the competitive structure of the market

welfare, that particular practice can be justified if appropriate evidence can be mustered. Similarly, the rule against payments of the sort made by Intel is also ultimately justified on the basis of consumer welfare: such payment practices are detrimental to consumer welfare, hence they are prohibited. However, as formulated by the court in this case, this rule admits to no exception.

The difficulty, however, with the Court's approach (or indeed with any approach which uses multiple rules) is the internal consistency of that set or rules, or the consistency of a given rule with other principles or practices in the system. The General Court's decision in *Intel* is a case in point. Here the Court advanced an exception-less rule prohibiting exclusivity rebates. In other cases EU courts have rejected exception-less rules as the appropriate means of governing other anti-competitive practices which have similar effects.

For instance, in *Post Danmark I*<sup>97</sup> the ECJ held that effects-based analysis is the appropriate means of analysing selective price cuts. In *Post Danmark II*<sup>98</sup> the ECJ applies effects-based reasoning to standardised all-unit rebates, and similarly in *TeliaSonera*<sup>99</sup> to margin squeeze. The exclusionary practice in each of these three cases has the same effect on the market as the exclusionary rebates in *Intel*.<sup>100</sup> Yet, in each of those three cases the respective Court held that the given practice is to be prohibited only if anti-competitive effects can be demonstrated. That effects-based approach contradicts the absolute, rule-driven position of *Intel*.

Thus, the most significant difficulty with *Intel* may not be that it establishes an exception-less rule. Rather the problem may be that the *content* of *Intel*'s rule may be inconsistent with other principles in the competition regime. But this, I must emphasise, is a criticism of the *content of the rule*, and not the use of a *rule-based form of reasoning*.

## CONCLUSION

Thus viewed, the rules identified by the Court can be considered against the backdrop the first part of this article. To a consequentialist who wishes to achieve a particular goal (here, the maximisation of consumer welfare) using rules to determine the legality of the process appears to be a clumsy, if not redundant, approach to achieving the goal. First, consumer welfare is mediated through the filter of ensuring an appropriate vision of a competitive market structure. This mediation, for the strict consequentialist, is problematic. Market structure is at best a proxy for maximisation of consumer welfare. The correlation between market structure and consumer welfare maximisation is neither perfect nor clear; and to the extent there are errors in determining what a 'better' market structure may be, these errors will lower the correlation between the two. In these circumstances, the obvious (consequentialist) retort is to demand that this

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<sup>97</sup> C-209/10 *Post Danmark A/S v Konkurrencerådet* (ECLI:EU:C:2012:172, 27 March 2012) at e.g. paras. 26 and 44

<sup>98</sup> C-23/14 *Post Danmark A/S v Konkurrencerådet* (ECLI:EU:C:2015:651, 6 October 2015) at e.g. paras. 29, 31, 38, 50, 64 – 74

<sup>99</sup> C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] E.C.R. I-527, at e.g. paras. 28, 61 – 68, 76 – 77

<sup>100</sup> I wish to thank an anonymous referee who pointed this out.

mediated reasoning be abandoned, and apply strictly a rule of consumer welfare maximisation. Second, and directly related to this, is that element of the rule which allows for the rule to be set aside in the event that evidence can be mustered showing that a practice in question indeed promotes consumer welfare. The strict consequentialist points out that if such a legal rule is properly administered, it would be extensionally equivalent to a simple rule which states ‘maximise consumer welfare.’ The use of rules, in these circumstances—it would be argued—smacks of rule fetishism.

Identical criticisms can be mustered against *Intel’s* rule against payments. Indeed, that rule can be subject to the additional criticism that its use of rules goes beyond a fetish and becomes ‘rule worship.’ As formulated by the Court, the rule admits of no exceptions: in the (admittedly unlikely) event that such a payment could be justified on consumer welfare maximising grounds, the payment is not permitted, precisely because the rule prohibits it.

Alternatively, the rules can be used as short cuts in the reasoning process, somewhat akin to the ‘reasoning account’ of rules in utilitarianism noted above.<sup>101</sup> This vision views rules as useful tools, to assist in establishing the appropriate normative or legal conclusion regarding a (proposed) course of action. As we know that certain acts have a general tendency to promote certain results, we develop rules to reflect these general tendencies, and reason accordingly when considering the courses of action open to us. In effect, rules provide short cuts in our deliberation process.

*Intel’s* rule regarding exclusivity rebates can be regarded as such a ‘short cut.’ Given that rebates which leverage the captive amount into the contestable amount are well known to foreclose the market to competitors of the dominant undertaking and have resulting detriment to the consumer, a ‘quick and ready’ rule can be established to prohibit this practice. Where a particular exclusivity rebate scheme can be shown to demonstrably maximise consumer welfare, the rule can be set aside. The rule against payment practices has a similar structure. In its strict formulation (i.e. as literally stated by the Court, and admitting of no exception) the rule reads something to effect of ‘given that this sort practice will never enhance consumer surplus, the practice is prohibited.’ (An alternative formulation, ‘reading in’ an exception when consumer surplus is indeed demonstrably maximised by the practice, results in this latter rule having the same formal structure as the former.)

Further credence to the view of rules as short cuts in the reasoning process can perhaps be found in the Court’s use of market structure in its condemnation of the practices. If the Court views market structure as a proxy for consumer welfare, then it is engaging in this sort of use of rules to guide reasoning. Rather than requiring an extensive analysis of the gains and losses to consumer welfare occasioned by a particular practice, the Court can examine the effect that the practice is likely to have on the structure of the relevant market and draw its conclusion from that. This ‘quick and ready’ process of analysis is consistent with using the rules as a means of guiding the reasoning process.

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<sup>101</sup> See text preceding n 20, above.

Rules, as short cuts in reasoning, can be subject to the same criticisms that rules as determinants of legality are. They are redundant: if achieving a particular goal is the desired outcome of the legal system, then the focus (and hence reasoning process) should be directed to that outcome directly—not through the mediation of the rules. We note that both sorts of criticisms are merely a new version of the old song about utilitarian reasoning.

The difficulty here, though, is there is a disanalogy between law and ethics and hence legal and ethical reasoning. To a great extent, the underlying principle required in developing a theory in ethics (or in any other branch of philosophy, for that matter) is consistency. A theory that is internally inconsistent must be rejected, and mathematical (or scientific) standards of consistency are regarded as the norm. As such ethicists may be significantly focused the periphery of the theory, attempting to refine it in a manner which ‘irons out’ any apparent counter-example, no matter how extreme the counter-example might be. Kant’s well known intellectual gymnastics worrying about whether it was appropriate to lie to a homicidal individual asking the whereabouts of his intended victim<sup>102</sup> is a good illustration of this.

The motivation behind legal reasoning and the place of rules in it is markedly different. As noted in the earlier discussion regarding rule of law considerations,<sup>103</sup> legal rules provide the certainty and predictability on which all affected can rely. Indeed, in the context of *Intel*, Whish notes this thus:

‘The expression ‘form-based’ is always used pejoratively, but laws by their very nature have ‘form’. It is as a result of the form based nature of Article 102 that only dominant firms can be found guilty of abuse: ... . Plenty of other perfectly sensible rules of this kind could be listed. Such rules exist in order to render Article 102 administrable: lawyers, economists, officials, and judges—and above all businesses—have to be able to predict with reasonable certainty what is lawful and what is not.’<sup>104</sup>

This describes the very purpose of legal rules as guides to reason.

Should *Intel* be read in this manner, the General Court had provided us with admirable, albeit rule-based, guidance of how rebates can legitimately be offered by dominant firms. The Court demarcates three categories of rebates, and the criteria for the acceptability of each are well identified. Similarly, the Court articulates a rule regarding payment practices designed to hinder the marketing of a competitor’s products. Each of these rules serves as bright lines, identifying permitted and prohibited conduct. With these rules established, clear legal advice can be given, and businesses can conduct themselves on the market accordingly.

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<sup>102</sup> See n 25, above. Smart is also guilty of this, worrying whether the normally beneficial act of rescuing a drowning small child is indeed correct give that the child grows up to become a genocidal tyrant: see Smart (n 22) at 353.

<sup>103</sup> See text accompanying notes 27 and 44.

<sup>104</sup> Whish (n 3) at 1 – 2

However, I make two brief comments about these rules. First, as noted, the rule regarding exclusivity rebates admits of a consumer welfare-based exception. As such, it is inaccurate to dismiss this particular rule—in a pejorative manner—as ‘formalistic.’ Second, there may be a concern with the availability of consumer welfare-based exceptions to a general rule. If the requirements or standards are set too high, then the exception becomes illusory. Yet this is not—directly—a criticism of the rule in itself, rather a criticism of the evidentiary standards required to avail of the exception.

In spite of the clarity, which *Intel* provides by producing a set of rules, governing rebates and payments, the Court’s reasoning in producing the rules one point of concern that has been unnoticed in the literature. This is the link between market structure and consumer welfare. Further interference with market structure is the reason given for the general prohibition of exclusivity rebates. This general prohibition is subject to a consumer welfare exception. The Court’s acknowledgement of such an exception recognises that at least in its mind such a link exists.

The concern of course, is whether market structure is an accurate proxy for consumer surplus. Not only are there difficulties in determining the correlation between these two, there is a further problem. Typically, the proxy variable is more evident or measurable than the intended variable (i.e. that for which the proxy stands). Accordingly, a country’s GDP may serve as an easily measurable proxy for its (less apparently measurable) state of economic development. As market structure appears less subject to measure than consumer surplus, the court may have reversed the intended variable with the proxy.

Further, it may be the case that in its reasoning the Court through developing a rule based on harms to the market structure and then grafting on to this rule a consumer welfare exception, has conflated two distinct goals which possibly underlie EU competition policy: the protection of consumers (or more particularly interpreted—at least by the Commission—the maximisation of consumer welfare) and the protection (or promotion) of a market structure in which competition can thrive. If indeed these are two distinct goals,<sup>105</sup> then judicial guidance may be required to mitigate any conflicts between them. This may be particularly pressing if future judicial interpretation of these goals is to limit an ‘economic approach’ to European competition law. However, while such judicial clarification of these goals may be desired,<sup>106</sup> given the Courts’ reticence to address issues beyond those strictly necessary to resolve the legal dispute at hand, it may be a considerable time before such clarification is issued.

Yet this dispute surrounding *Intel* shows us that one thing is certain. To the extent that any of the competition goals that are identified by the Courts, academics or practitioners involve some property that can be at least crudely quantified, there will be conflicting demands placed on those administering the competition regime. These demands will be, first, to provide clear, workable rules which satisfy not just theoretical rule of law considerations, but also to provide a base from which advice can be given to

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<sup>105</sup> As is frequently suggested in the literature, see e.g. the sources cited in note 28 and following.

<sup>106</sup> See e.g. Peeperkorn (quoted n 28) who suggests that the ECJ should use its judgment in the appeal to issue such clarification.



guide undertakings' conduct on the market. The second demand will be that this system maximise that property with the possible explicit claim that a legal rule's failure to do so emphasises form at the possible cost of content. These cries of 'formalism' echo the old cry of 'rule worship' which utilitarians heard some decades ago. Indeed, the more distinct these echoes become, the more those echoes sound like a 2015 cover version of an old song: 'Suspicious Minds,' perhaps?