

## Remarks on the ECJ judgement on Intel

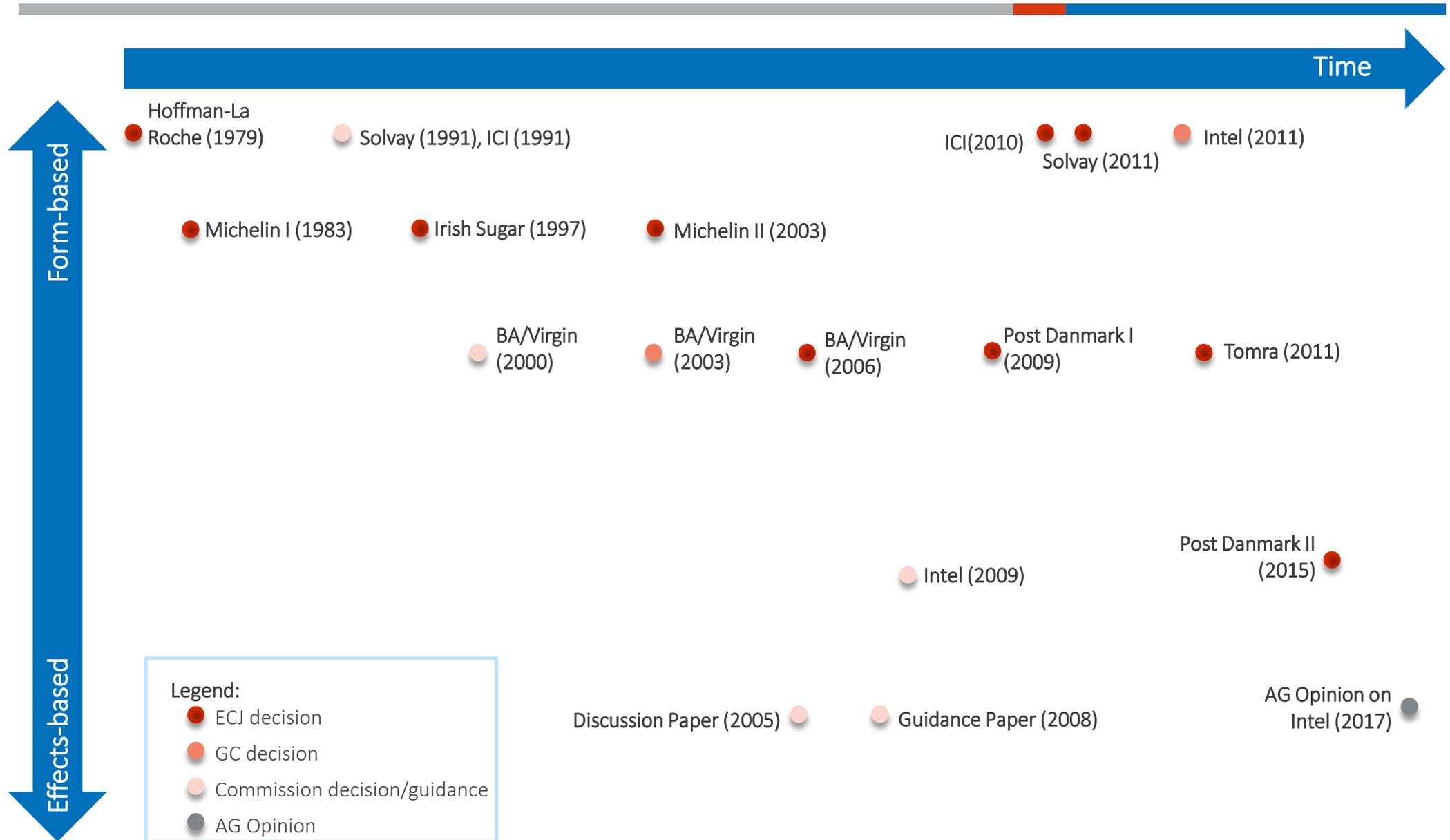
# A (partial) triumph of common and economic sense

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# EVOLUTION OF THE ASSESSMENT OF LOYALTY REBATES IN CASE LAW



# INTEL JUDGEMENT – IMPLICATIONS

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- The General Court de facto put exclusivity rebates in the “per se” box.
- An economist’s understanding of the judgement:
  1. The ECJ does not make a distinction between object and effect infringements
  2. The ECJ does not make a distinction between capable and likely
  3. The ECJ does not endorse an effects based approach for all conditional rebates (i.e. does not require the Commission to prove “anticompetitive effects”)

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4. The ECJ requires that exclusivity rebates are assessed in the same way as fidelity rebates:
    - Conditional rebates (including exclusivity rebates) are presumptively abusive.
    - But this presumption is rebuttable
  5. The ECJ “clarifies” that there are three ways to rebut that presumption (on the defendant)
    - (i) No capability to foreclose / (ii) No foreclosure of an AEC / (iii) objective justifications or efficiencies
  6. The Commission to assess the evidence presented to rebut and if necessary balance pro and anticompetitive effects.
  7. This “clarification” is a de facto endorsement of the 102 Commission Guidance – this has consequences for the general applicability of the Guidance.

# CONDITIONAL REBATES (INCLUDING EXCLUSIVITY REBATES) ARE PRESUMPTIVELY ABUSIVE

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- Rebuttable presumption:
  - *137 In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain **all or most of their requirements exclusively** from that undertaking **abuses its dominant position** within the meaning of Article 102 TFEU.*
  - *138. However, that case-law must be further clarified in the case where the **undertaking concerned submits**, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.*

# REBUTTING THE PRESUMPTION

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- Two ways to rebut the illegality presumption:
  - (i) **no capability to foreclose**. To discharge the burden:
    - Apply an “all circumstances test”: The Commission’s theory of harm (explicit or implicit) is not consistent with facts of the case
  - (ii) **no likely or actual anticompetitive foreclosure**. How to discharge the burden:
    - Qualitative approach: No actual AECs. No likely foreclosure. No evidence of actual foreclosure
    - Quantitative approach: AEC test
- Meaning of “*in particular*”: (ii) is likely more persuasive than (i)

# (I) NO CAPABILITY TO FORECLOSE: (NO COGENT THEORY OF HARM) “ALL RELEVANT CIRCUMSTANCES” TEST

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- All relevant circumstances test:
  - Identify the ToH (explicit or implicit): the mechanism through which the conditional rebates have the capability to foreclose competitors.
  - Assess whether the facts of the case match the ToH:

*(139 In that case, the Commission is not only required to analyse, first...)*

- the company’s position on the relevant market (**degree of dominance**)
  - how much of the market was covered by the practice in question (**market coverage**)
  - the terms on which they are granted, their duration, and amount (**rebate significance**)
  - a strategy to exclude as-efficient competitors (**strategic intent to foreclose**)
- No need to show actual effects.
  - No need to show likely effects.

## [ALL RELEVANT CIRCUMSTANCES” TEST IN THE 102 GUIDANCE]

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- *The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment:*
  - ***the position of the dominant undertaking** / the conditions on the relevant market / the position of the dominant undertaking's competitors.*
  - ***the extent of the allegedly abusive conduct:** in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect*
  - ***the position of the customers or input suppliers:** this may include consideration of the possible selectivity of the conduct in question*
  - ***direct evidence of any exclusionary strategy***

## (II) NO EFFECTS (NO FORECLOSURE OF AN AEC): AEC STANDARD

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- 133 *In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market (see, inter alia, judgment of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, paragraph 21 and the case-law cited).*
- The Commission's foreclosure analysis must assess the
  - *'intrinsic capacity ... to foreclose competitors which are **at least as efficient** as the dominant undertaking'*
- Commission Guidance in Par 23: vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is **capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking**.

# IMPLEMENTING THE AEC STANDARD

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- Two ways to implement the AEC Standard:

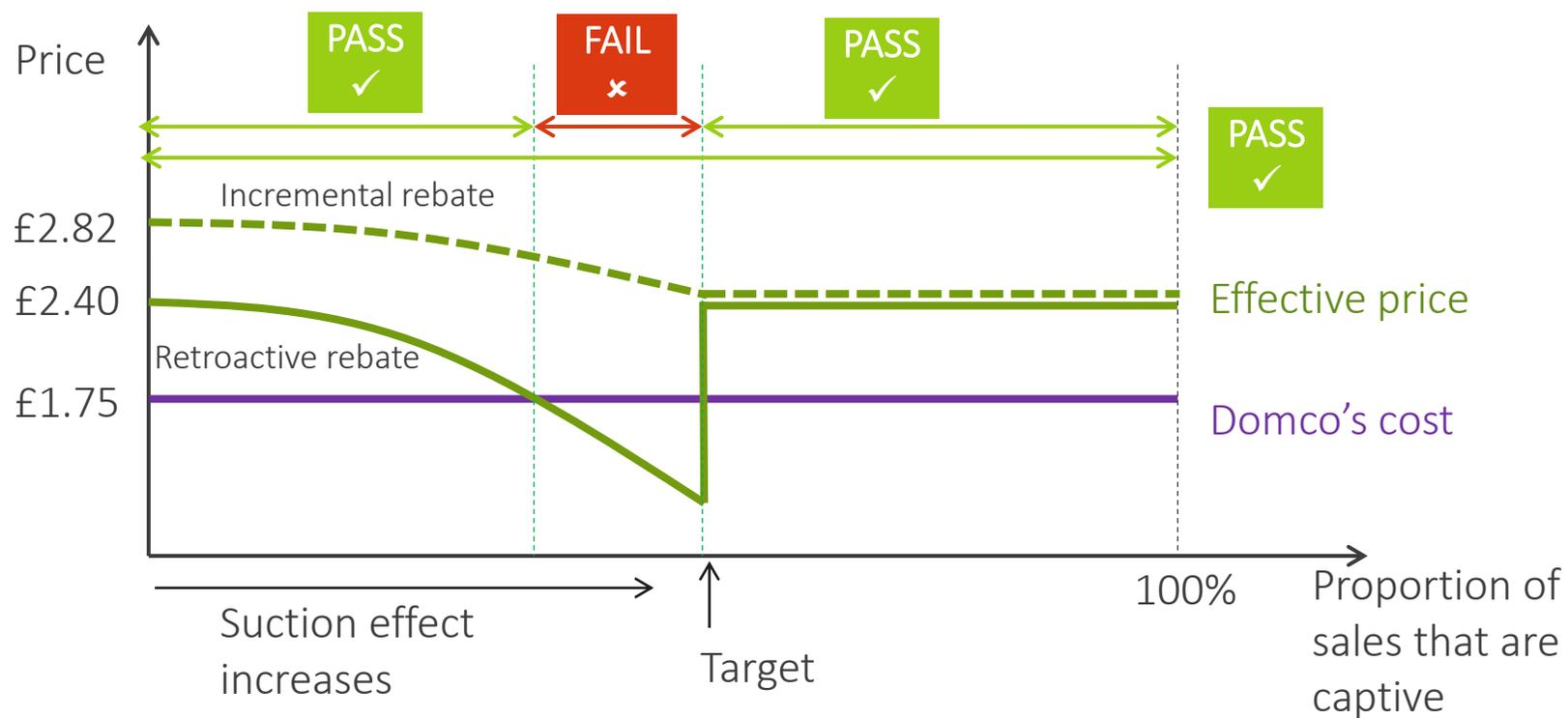
## 1. No likely (or no actual) foreclosure of an AEC:

- Review the ToH and assess (qualitative and quantitative) evidence on the position of (**actual**) competitors: is foreclosure on an AEC likely?
- Par 20 Guidance Paper: *possible evidence of actual foreclosure*

## 2. Apply an (hypothetical) AEC test

- 102 Commission Guidance Par 24 :
  - *In order to determine whether even a **hypothetical competitor as efficient as the dominant undertaking** would be likely to be foreclosed by the conduct in question, **the Commission will examine economic data relating to cost and sales prices,***
  - *...In this context the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking.*
- For the parties an AEC test may be the only way to rebut the presumption since it does not require data or information on competitors and relies on own data
- But no obligation for either the defendant or the Commission to apply an AEC test.

# AEC TEST – SENSITIVITIES



# THE THIRD WAY: OBJECTIVE JUSTIFICATION AND EFFICIENCIES

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- *ECJ Intel judgement:*
  - *134: The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, **may be objectively justified.***
  - *In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, **may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer** (judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 86).*
  - ***That balancing** of the favourable and unfavourable effects of the practice in question on competition **can be carried out in the Commission's decision only after** an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.*
- Guidance paper par 28:
  - *A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.*

# CAN FIDELITY DISCOUNTS PRODUCE OFFSETTING EFFICIENCIES?

- A fidelity discount may be **procompetitive** even when it has an adverse impact on market structure if it gives rise to offsetting efficiencies
  - Optimise fixed cost recovery in the presence of economies of scale and scope in production and/or distribution
  - Mitigate double marginalisation
  - Buyer incentives:
    - Agency and
    - Common agency problems
  - Seller incentives:
    - *Ex-post opportunism*
    - Free-riding

