

Article

The Growing Legacy of *Intel*

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I. Introduction

Competition cases routinely hinge on the fundamental distinction between conduct that anti-competitively serves to exclude competitors, on the one hand, and competition on the merits that may lead firms to exit the market, on the other.¹ Although even first-year law students intuitively understand this critical distinction, it can prove challenging to distinguish between the two in real-world cases. The reason is simple: anticompetitive foreclosure and competition on the merits both ultimately result in the same observable outcome: namely, that rivals exit the market. In order to draw the line, policymakers must infer both the root causes and the effects of firms' market exit.

Against this backdrop, it is becoming increasingly clear that the 2017 *Intel* ruling marked a crucial turning point in the enforcement of Article 102 TFEU.² The ruling's powerful legacy notably looms large over other recent court cases, such as the European Court of Justice's ('ECJ') ruling in *Servizio Elettrico Nazionale and Others*, as well as the General Court's ('GC') *Intel Renvoi* and *Qualcomm* judgments.³ In these *Intel*-inspired rulings, the European judiciary appears to have settled largely on a workable effects-based standard that sorts the wheat from the chaff in all Article 102 TFEU cases. It does this, notably, by looking at the effect that a firm's behaviour has on 'as-efficient competitors', while also creating an administrable standard of proof to govern such proceedings.

Key Points

- Starting with the *Intel* ruling, the European judiciary has slowly crafted a coherent framework for Article 102 enforcement.
- However, doubts persist concerning the exact scope of *Intel* and whether it is truly the lodestar that some make it out to be.
- It is arguably still unclear whether 'non-price' conduct, such as self-preferencing, should be assessed under the general framework laid out in *Intel*, which concerned price-rebate schemes.
- With this in mind, the upcoming *Google Shopping* ruling will likely be the bellwether that reveals the true legacy of *Intel* and the future direction of European competition law.

This is not to say that Article 102 TFEU case law is entirely settled—far from it. For instance, it is arguably still unclear whether 'non-price' conduct, such as self-preferencing, should be assessed under the general framework laid out in *Intel*, which concerned price-rebate schemes. To wit, the GC's *Google Shopping* judgment marks a clear departure from the *Intel* framework under the justification that '[i]n the present case, the practices at issue are not pricing practices'.⁴ Despite nominally looking into the effects of Google's 'self-preferencing', the GC eschewed key aspects of the *Intel* framework, such as the effect of Google's behaviour on 'as-efficient competitors'.⁵ This and other aspects of the ruling

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1 Case C-209/10 *Post Danmark*, EU:C:2012:172, para 22; Case C-52/09 *TeliaSonera*, ECLI:EU:C:2011:83, para 43.

2 Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:788.

3 Case C-377/20 *Servizio Elettrico Nazionale and Others*, ECLI:EU:C:2022:379 ('*Servizio Elettrico Nazionale and Others*'); Case T-286/09 *RENV Intel v Commission*, ECLI:EU:T:2022:19; Case T-235/18 *Qualcomm v Commission*, ECLI:EU:T:2022:358.

4 Case T-612/17 *Google Shopping*, ECLI:EU:T:2021:763.

5 *Id.*, para 538 ('[A]s regards the arguments summarised in paragraph 514 above, according to which the Commission failed to demonstrate that competing comparison shopping services that had experienced difficulties were as efficient as Google, when in fact they are not, the Commission is in maintaining that it was not required to prove this. The use of the as-efficient-competitor test is warranted in the case of pricing practices (predatory pricing or a margin squeeze, for example), in order, in essence, to assess whether a competitor that is as efficient as the dominant undertaking allegedly responsible for those pricing practices, and which, in order not to be driven immediately from the market, would charge its customers the same prices as those charged by that undertaking, would have to do so at a loss and accentuating that loss, causing it to leave the market in the longer term In the present case, the practices at issue are not pricing practices'.)

led to criticism that the GC failed to establish a clear boundary between anticompetitive self-preferencing and permissible instances of firms favouring their own products. As Elias Deutscher has observed:

Although the Court considered various pathways to determine the legality of self-preferencing, it failed to articulate a clear legal test that establishes limiting principles as to when self-preferencing by a dominant firm violates EU competition law.⁶

With this in mind, the pending *Google Shopping* appeal ruling offers the ECJ a unique opportunity to settle the debate. Namely, the ECJ may confirm that the lessons from the *Intel* strand of case law apply across the board, and reaffirm the dividing line between anticompetitive and benign conduct, including self-preferencing under Article 102 TFEU. This may prove a politically fraught endeavour, as the Digital Markets Act ('DMA') will essentially outlaw the same behaviour—at least for so-called 'gatekeeper' firms.⁷ It is, however, vital to safeguard the internal consistency of competition enforcement under Article 102 TFEU.

II. *Intel* and the analysis of foreclosure

The history leading up to the *Intel* cases is well-known. In 2009, the European Commission ('commission') found that rebates granted by Intel to certain original equipment manufacturers ('OEMs') foreclosed its competitor AMD ("Advanced Micro Devices, Inc.") from the market.⁸ During the administrative procedure, the Commission claimed it did not need to take into account the effects of the practice, as the exclusivity rebates in question were automatically illegal under Article 102 TFEU.⁹

6 Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-preferencing Under Article 102 TFEU' (2022) 6 *European Papers*, 1345–1361; see also Pablo Ibañez Colomo, 'Self-Preferencing: Yet Another Epithet in need of Limiting Principles' (2020) 43 *World Competition*, 417, 443.

7 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265; on the potential overlaps and conflicts between EU competition law and the Digital Markets Act, see Giuseppe Colangelo, 'The European Digital Markets Act and Antitrust Enforcement: A Liaison Dangereuse' (2022) ICL White Paper. A revised version of the paper is forthcoming in *European Law Review*. Available at SSRN: <https://ssrn.com/abstract=4070310> or <http://dx.doi.org/10.2139/ssrn.4070310> (Accessed 28 Nov. 2022).

8 *Intel* (COMP/C-3/37.990) Commission Decision of 13 May 2009.

9 *Id.*, paras 920–24; 1760–61. See e.g., at 1760: 'thirdly, the as efficient competitor analysis conducted in section VII.4.2.3 is not relevant for the purpose of deciding whether the Commission should impose a fine or for determining its level as it does not relate to the existence of the infringement or to the question whether it was committed intentionally or by negligence, or to its gravity within the meaning of Article 23(2)(a) of Regulation (EC) No 1/2003 and of the Guidelines, in particular points 19 to 23 thereof.'

The Commission nevertheless carried out an 'as-efficient competitor' ('AEC') test 'for the sake of completeness'.¹⁰ In a nutshell, the AEC test inquires whether a rebate scheme is able to exclude competitors from the market that are at least as efficient as the dominant firm.

During the subsequent annulment proceedings, Intel claimed the Commission had failed to apply the AEC test correctly. The GC dismissed Intel's appeal on grounds that its conduct was *per se* illegal. The Commission was thus not required to assess the effects of the exclusivity rebates.¹¹

Intel took the case to the ECJ, which overturned the GC's ruling and found that—while the Commission can, under certain circumstances, rely on a *presumption* of illegality—exclusivity rebates are not automatically illegal under Article 102 TFEU.¹² In other words, the anticompetitive effects of a practice must always be assessed, regardless of how the burden of proof is allocated.

The ECJ laid out the standard of proof that parties must meet in such cases. It held that:

138. [W]here 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. . . .

139. [T]he Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible **existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking** from the market (see, by analogy, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29).¹³

The underlying standard appears rather straightforward: if and when a defendant raises such an objection, the Commission must show that the firm's conduct is capable of excluding 'as efficient' competitors. The focus on AECs is repeated in the following paragraph:

140. . . . 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.¹⁴

The ECJ's ruling sparked numerous debates. Scholars notably questioned how it would be interpreted by the

10 *Id.*, paras 1002–1153.

11 Case T-286/09 *Intel v Commission*, 145 and 152.

12 Case C-413/14 P *Intel v Commission*.

13 *Id.*

14 *Id.*

lower court when it reexamined the case. The key question was whether *Intel* should be read mostly as a procedural ruling—in which case, the main problem was merely that the Commission and GC did not appropriately respond to certain of Intel's claims, something that could be corrected upon reexamination¹⁵—or whether, instead, the ECJ had ultimately outlined a substantive framework to assess (at least) rebates under Article 102 TFEU.¹⁶

Although the finer points of its so-called 'renvoi' ruling are beyond the scope of this article, the GC appears to have opted for a maximalist interpretation of *Intel*. It examined the effects of Intel's rebates in great detail, following each step of the ECJ's framework. As it explained:

125 ... Having regard to the wording of paragraph 139 of the judgment on the appeal, the Commission is, as a minimum, required to **examine those five criteria for the purposes of assessing the foreclosure capability of a system of rebates**, such as that at issue in the present case.¹⁷

Following this logic, the GC examined several aspects of Intel's rebates under a detailed-effects analysis, including their duration, market coverage, and age, as well as their effect on AECs (three of the five criteria set out in *Intel*).¹⁸

The *Intel* framework was also central to the GC's more recent *Qualcomm* ruling, which appears to confirm and develop insights from *Intel*.¹⁹ In the judgment, the GC quashed a EUR 1 billion fine the Commission imposed on Qualcomm under Article 102 TFEU. Under scrutiny was an agreement pursuant to which Apple received payments conditional upon sourcing all of its LTE chips from Qualcomm. According to the Commission, such 'exclusivity payments' were capable of foreclosing competition, in that they reduced the incentives of a major purchaser of baseband chipsets to switch to competing producers.²⁰

The GC ultimately overturned the Commission's decision on both procedural and substantive grounds. It notably found that the Commission had carried out an improper analysis of anticompetitive effects. According to the Court, the Commission failed to show that Apple would not have sourced all its LTE chips from Qualcomm absent the impugned agreement. In fact, at the time of the 'exclusive payment' agreement (2011–2015, and half

of 2016), Qualcomm was the only company capable of satisfying Apple's demand for LTE chips.²¹ Accordingly, Apple's decision to buy exclusively from Qualcomm could easily be attributed to 'competition on the merits', rather than anticompetitive conduct.²²

The GC reiterated that the Commission must consider all the relevant facts of the case, as well as the supporting evidence submitted by Qualcomm that its conduct could not restrict competition and, in particular, could not have the alleged foreclosure effects.²³ As the Court put it:

Indeed, if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects, and that assessment must be undertaken having regard to all the relevant facts surrounding that conduct (see judgment of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 154 and the case-law cited).²⁴

The upshot is that Qualcomm's exclusivity payments were incapable of excluding competitors, as there were no competitors to exclude in the first place.²⁵ By failing to make the link between the relevant factual circumstances and its theory of harm (i.e., the alleged lessening of Apple's incentives to switch to a competitor to source all its LTE chipset requirements for iPhones), the Commission had fallen afoul of a line of case law, epitomised by *Post Danmark*, establishing that competition-law analysis cannot be purely hypothetical.²⁶

Throughout its judgment, the Qualcomm court makes numerous references to *Intel* and its key finding that anticompetitive behaviour must be capable of excluding *as-efficient competitors*.²⁷ For instance, in paragraph 356 of the judgment, the GC states that:

the Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings as to the foreclosure capacity of **competitors that are at least as efficient**, relating to the practice in question (see, to that effect, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 141).²⁸

15 See, e.g., Ruppert Podszun, 'The Role of Economics in Competition Law: The 'Effects-Based Approach' After the Intel Judgment of the CJEU' (2018) 7 *Journal of European Consumer and Market Law* 57, 64. 'Intel does not reconceptualise Article 102 TFEU. It is a case on procedural fairness. It does not call for an effects-based approach in competition law'.

16 See, e.g., Pablo Ibáñez Colomo, 'The Future of Article 102 TFEU after Intel' (2018) 9 *Journal of European Competition Law & Practice* 293.

17 Case T-286/09 *RENV Intel v Commission*

18 *Id.*, para 128 et seq.

19 *Qualcomm v Commission*.

20 *Qualcomm* (Case COMP/AT.40220) Commission Decision of 24 January 2018.

21 *Id.*, para 405–417.

22 *Id.*, para 414.

23 *Id.*, paras 354, 396.

24 *Id.*, para 355.

25 *Id.*, para. 410. ('The undisputed fact that, on the relevant market, there was no technical alternative to the applicant's LTE chipsets for a very large part of Apple's requirements during the period concerned is a relevant factual circumstance which must be taken into account when analysing the capability of the payments concerned to have foreclosure effects, since the Commission found that capability in the light of Apple's total requirements for LTE chipsets and, in particular, in the light of the reduction of Apple's incentives to switch to the applicant's competitors for all its requirements'.)

26 *Id.*, paras 397, 412, 415; see also Case C-23/14 *Post Danmark*, EU:C:2015:651, para 65–68.

27 For instance, *id.*, para 349–356.

28 *Commission v. Qualcomm*, para 356.

The judgment also highlighted the importance of identifying the difference between anticompetitive conduct and competition on the merits. The Commission had conflated the two, and it had cost it the case. As the GC found:

The fact—which was not properly taken into account in the contested decision—that Apple sourced LTE chipsets from the applicant, and not from the applicant’s competitors, in the light of the absence of alternatives fulfilling its own technical requirements *could fall within competition on the merits, and not an anticompetitive foreclosure effect* resulting from the payments concerned.²⁹ (emphasis added).

It had also failed to show how the conduct in question prevented competitors that were as efficient as Qualcomm from developing products that fulfilled Apple’s requirements, but ‘that Apple’s incentives to switch to the applicant’s competitors for all its LTE chipset requirements had been reduced’.³⁰

Taken together, the two *Intel* rulings and *Qualcomm* mark a clear rejection of the forms-based approach that initially enabled the Commission to ignore the economic arguments put forward by firms like Intel and Qualcomm. At least as far as rebates are concerned, the rulings marked the end of a policy of excessively deferential judicial review that turned a blind eye to what are, arguably, important errors of economic analysis.

III. The *Intel* reasoning is not confined to the realm of price-related conduct

The preceding paragraphs raise an important question that goes to the very foundations of European competition law. Since its adoption in 2017, there have, broadly speaking, been two competing views concerning the ECJ’s *Intel* ruling.

The first view held that *Intel* was a contained statement of the law applying to rebates.³¹ For instance, Marc Van der Woude, a judge at the GC, has argued that the *Google Shopping* case was correctly decided, among other things, because the *Intel* case law had little bearing on it. As reported by Mlex:

He said . . . [t]he *Intel* case involved the application of a framework set out by the EU’s top court, while ‘Google is a new phenomenon’.

²⁹ *Id.*, para 414.

³⁰ *Id.*, para 416.

³¹ Nicholas Hirst, ‘Intel, Google Shopping Rules Don’t Conflict, Top EU Judge Says’, (*Mlex*, 31 March 2022), available at <https://mlexmarketinsight.com/news/insight/intel-google-shopping-rulings-don-t-conflict-to-p-eu-judge-says> (Accessed 28 Nov. 2022).

Van der Woude said . . . that the Commission did not always need to delve into economics. ‘It depends on the theory of harm you will develop as a regulator’.³²

Conversely, the second view contends that the *Intel* court was actually fleshing out a framework that undergirds all European competition law under Article 102 TFEU.³³ According to this interpretation, *Intel* is but the latest in a series of rulings, including *Post Danmark* and *Cartes Bancaires*, that seek to bring economic clarity to European competition law.³⁴

There are important reasons to believe this second view is most likely the correct one. First, the GC’s *Intel Renvoi* and *Google Shopping* rulings appear to imply that *Intel* is not merely a rebate-specific rule. The *Intel Renvoi* ruling, while ostensibly dealing with the topic of rebates, ultimately rests on what appears to be a more generalised framework of presumptions and effects analysis:

124 [A]lthough a system of rebates set up by an undertaking in a dominant position on the market may be characterised as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition, **the fact remains that what is involved is, in that regard, a mere presumption and not a per se infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to conduct an effects analysis.**³⁵

Second, the GC’s *Google Shopping* ruling adds two important pieces to this puzzle. The court notably reaffirms the idea that there are no ‘per se’ or ‘by object’ infringements under Article 102 TFEU, suggesting that the *Shopping* case should be assessed under an effects-based framework similar to the one laid out in *Intel*:

435 [U]nlike Article 101 TFEU, Article 102 TFEU does not distinguish forms of conduct that have as their object the prevention, restriction or distortion of competition from those which do not have that object but nevertheless have that effect.

Google Shopping also contains several important references to *Intel*. This is a clear sign the GC believes *Intel* is relevant outside the realm of rebates:

[W]here, in order to classify a practice in the light of the provisions of Article 102 TFEU, the Commission attaches real importance to an economic analysis, the Courts of the European Union are required to examine all of the arguments put forward by the undertaking penalised concerning that analysis (see, to that effect, judgment of 6 September

³² *Id.*

³³ See, e.g., Ibáñez Colomo (2018) 293. ‘The Court of Justice (hereinafter, the “Court” or the “ECJ”) introduced an important clarification that will have a significant impact on the analysis of abusive practices under Article 102 TFEU . . . Intel makes two fundamental contributions to our understanding of the notion of abuse’.

³⁴ *Post Danmark*; Case C-67/13 P *Cartes Bancaires*, ECLI:EU:C:2014:2204.

³⁵ Case T-286/09 *RENV Intel v Commission*, para 124.

2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 141 to 144).³⁶

157 Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, **lead to the departure from the market or the marginalisation of competitors that are less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation** (see judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 134 and the case-law cited).³⁷

Along similar lines, Advocate General Nils Wahl had, in his *Intel* opinion, unequivocally endorsed the notion that effects analysis undergirds all of Article 102 TFEU enforcement—and not just rebate cases.³⁸ The AG notably surmised that ‘an abuse of dominance is never established in the abstract’, and that courts should consider ‘the legal and economic context of the impugned conduct’. That AG Wahl subsequently uses predatory pricing (in a rebates case) to illustrate his point is further confirmation of this broad reading.³⁹

Finally, and perhaps most dispositively, the ECJ’s recent *Servizio Elettrico Nazionale and Others* ruling, while pertaining to non-price conduct, is replete with references to *Intel* and to the notion that behaviour is only anticompetitive if it is capable of foreclosing competitors that are at least as efficient⁴⁰:

En revanche, ainsi que la Cour l’a déjà souligné, ladite disposition ne s’oppose pas à ce que, du fait d’une concurrence par les mérites, disparaissent ou soient marginalisés sur le marché en cause des concurrents moins efficaces et donc moins intéressants pour les consommateurs du point de vue, notamment, des prix, du choix, de la qualité ou de l’innovation (arrêt du 6 septembre 2017, *Intel/Commission*, C-413/14 P, EU:C:2017:632, point 134 et jurisprudence citée).⁴¹

³⁶ *Google Shopping*, para 131.

³⁷ *Google Shopping*, para 157.

³⁸ Opinion of AG Wahl in Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2016:788, para 73. ‘In this section, I shall explain why an abuse of dominance is never established in the abstract: even in the case of presumptively unlawful practices, the Court has consistently examined the legal and economic context of the impugned conduct. In that sense, the assessment of the context of the conduct scrutinised constitutes a necessary corollary to determining whether an abuse of dominance has taken place. That is not surprising. The conduct scrutinised must, at the very least, be able to foreclose competitors from the market in order to fall under the prohibition laid down in Article 102 TFEU’.

³⁹ *Id.*, para 78. ‘As I see it, the analysis of ‘context’—or ‘all the circumstances’, as it is termed in the Court’s case-law—aims simply but crucially to ascertain that it has been established, to the requisite legal standard, that an undertaking has abused its dominant position. Even in the case of seemingly evident exclusionary behaviour, such as pricing below cost, context cannot be overlooked. Otherwise, conduct which, on occasion, is simply not capable of restricting competition would be caught by a blanket prohibition. Such a blanket prohibition would also risk catching and penalising pro-competitive conduct’ (footnotes omitted for ease of reading).

⁴⁰ *Servizio Elettrico Nazionale and Others*, paras 45, 46, 51, 73, 74 & 86.

⁴¹ *Id.* para 45.

As if this reference to *Intel*—the passage is originally from the *Post Danmark* ruling, which also concerned rebates⁴²—was not sufficiently clear, the judgment explicitly states that a practice’s effect on ‘as-efficient competitors’ is a key part of the legal test for *both price and non-price restrictions of competition*. According to the court, it is this criterion, among others, that differentiates competition on the merits that forces less-efficient firms to exit the market from anticompetitive foreclosure that causes as-efficient ones to exit, too:

La pertinence de l’impossibilité, matérielle ou rationnelle, pour un hypothétique concurrent aussi efficace, mais n’étant pas en position dominante, d’imiter la pratique en cause, aux fins de déterminer si cette dernière repose sur des moyens relevant d’une concurrence fondée sur les mérites, ressort de la jurisprudence relative aux pratiques tant tarifaires que non tarifaires. [The case has not yet been translated to English]⁴³.

This interpretation finds further support in the opinion issued by AG Rantos, who writes that:

[T]he case-law of the Court, in my view, confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of competition on the merits.

...

[A]s regards exclusionary practices not related to pricing—such as, for example, refusal to supply—the case-law seems to confirm the relevance of the test as regards the possibility of replication, inasmuch as a dominant undertaking’s decision to reserve for itself its own distribution network does not constitute a refusal to supply contrary to Article 102 TFEU when a competitor is able to create a second distribution network of a comparable size. In other words, there is no abuse if inputs refused by the dominant undertaking can be duplicated by equally efficient undertakings by purchasing them from other suppliers or developing them themselves.⁴⁴

The *Servizio Elettrico Nazionale and Others* ruling thus appears to confirm the substantive importance of *Intel*; clearly, it is not just a procedural ruling. It also appears to confirm *Intel*’s significance for Article 102 TFEU enforcement beyond rebates. Indeed, the numerous important references to *Intel* and its analytical framework would suggest that the case marks a clear turning point for European competition law. Moreover, the court explicitly

⁴² *Post Danmark*, para 22.

⁴³ *Id.*, para 79.

⁴⁴ Opinion of AG Rantos in Case C-377/20 *Servizio Elettrico Nazionale and Others*, paras 69–74.

acknowledges that the *Intel* framework also applies to ‘non-price’ conduct.

All of this reinforces the sense that all Article 102 TFEU cases are ultimately subject to an effects analysis, with the implication that the Commission and courts cannot summarily disregard economic arguments put forward by the parties. None of this is entirely new, of course. Several scholars have observed that other cases, like *Post Danmark* and *Cartes Bancaires*, already went a long way toward bringing European competition law more in line with economic analysis.⁴⁵ However, the *Intel* cases crystallise this trend in a way that increasingly looks like a general framework for all Article 102 TFEU cases.

IV. The implications of *Intel* as a general principle of European Union competition law

Subjecting all Article 102 TFEU cases to the *Intel* framework has far-reaching implications, including for ongoing cases such as *Google Shopping*. At its heart, the *Intel* framework ultimately seeks to ascertain whether conduct that can eliminate competitors is also *anticompetitive*. As the ECJ has explained in cases such as *TeliaSonera* and *Post Danmark*:

Not every exclusionary effect is necessarily detrimental to competition [...]. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality, or innovation.⁴⁶

In the *Intel* proceedings, the AEC test was one of the relevant tools used to establish whether that was indeed the case. However, under different circumstances, other tools may well be more useful in separating conduct that disadvantages or even eliminates competitors—and is also *anticompetitive*—from conduct that has essentially the same effect but is not. The Court of Justice says this much in its *Servizio Elettrico Nazionale and Others* ruling:

[L]’importance généralement accordée audit test, lorsque celui-ci est réalisable, n’en démontre pas moins que l’incapacité qu’aurait un hypothétique concurrent aussi efficace de répliquer le comportement

45 See, e.g., Jao Cardoso Pereira, ‘Groupement des Cartes Bancaires: Reshaping the Object Box’ (2015) 18 Competition and Regulation 265, 266. ‘This judgment shows how economic analysis plays an increasing role in shaping the boundaries of competition policy. In this judgment, the ECJ has taken insights from recent advances in the economic analysis of two-sided markets to reach the conclusion that the pricing measures adopted by the Groupement could not be treated as a restriction of competition by object’. See also, Dirk Auer & Nicolas Petit, ‘Two-Sided Markets and the Challenge of Turning Economic Theory into Antitrust Policy’ (2015) 60 The Antitrust Bulletin, 447.

46 *Post Danmark*, para 22.

de l’entreprise dominante constituée, s’agissant des pratiques d’éviction, l’un des critères permettant de déterminer si ce comportement doit être considéré comme étant ou non fondé sur l’utilisation de moyens relevant d’une concurrence normale.⁴⁷

Several recent cases fall short in this respect, making them vulnerable to challenges under *Intel*. *Google Shopping* is a prime example. In its ruling, the GC appears to suggest that it is anticompetitive for a dominant platform to favour its downstream services if doing so reduces web traffic to rivals:

445. [T]he Commission was fully entitled to conclude... that those practices had led to a reduction of that traffic for almost all competing comparison shopping services and, secondly, that those practices had led to an increase in traffic to Google’s comparison shopping service... and it may be concluded that the Commission established actual effects that are more or less pronounced, depending on the country, but in any event significant.

But unlike the detailed-effects analysis of *Intel*, the GC’s approach is tantamount to a *per se* condemnation of so-called ‘self-preferencing’. Indeed, favouring one’s own services necessarily puts competitors at a disadvantage, some of whom might even exit the market. As Pablo Ibañez Colomo has written:

If the notion of anticompetitive effects were equated with a competitive disadvantage, then self-preferencing would become, *de facto* and by definition, *prima facie* unlawful⁴⁸.

This forms-based analysis withers under the *Intel* framework. Indeed, in what would later turn out to be a direct contradiction of the upper court’s *Servizio Elettrico Nazionale and Others* ruling, the GC consciously ignores whether foreclosed rivals are as efficient as the dominant company:

538. The use of the as-efficient-competitor test is warranted in the case of pricing practices (predatory pricing or a margin squeeze, for example)... In the present case, the practices at issue are not pricing practices.

We believe this is an unduly narrow reading of *Intel*. In *Intel*, the ECJ carefully distinguished the AEC test from the notion of ‘less attractive’ or ‘less efficient’ rivals. Although the former is rightly confined to the realm of pricing practices, the latter offers a framework for deciding a much broader range of competition cases.

Few would argue it is desirable for less attractive websites to be displayed as prominently as more attractive ones, or that less-efficient firms should be shielded from

47 *Servizio Elettrico Nazionale and Others*, para 82.

48 Pablo Ibañez Colomo, ‘Self-Preferencing: Yet Another Epithet in need of Limiting Principles’ (2020) 43 World Competition, 417, 443.

market exit if they cannot profitably compete in an auction (as is the case for rivals complaining about the *Google Shopping* remedy).⁴⁹ Focusing on efficiency (or attractiveness, to use the ECJ's words) is critical to draw the line between market exit that occurs due to consumer demand and that which stems from an anticompetitive strategy that harms consumers. The standard outlined in *Google Shopping* ignores this distinction.

This error has important consequences. Practices whereby some firms—including dominant ones—give a leg up to their own products or services often result from competition on the merits.⁵⁰ This is especially true when one considers the *Servizio Elettrico Nazionale and Others* finding—quoted in full above⁵¹—that a dominant firm's conduct is more likely to result from competition on the merits when non-dominant firms deploy similar strategies. Unfortunately, this very argument was rejected by the GC in *Google Shopping*:

Secondly, even if, as Google indicates in the application, 'Bing's product ads must link to pages where users can purchase the offer', that does not address the competition concern identified. What is at issue in the present case is not Microsoft's conduct via its Bing search engine, which, moreover, is not in a dominant position on the market for general search services, but Google's conduct. The fact that Bing's ads also link internet users to merchants does not preclude Google's conduct from being anticompetitive.⁵²

To be clear, nothing in the case law we have discussed suggests that non-dominant firms implementing the same practice as a dominant firm is *dispositive* proof that the conduct belongs to competition on the merits. It does, however, suggest that the GC was wrong to dismiss Google's claim out of hand. Indeed, as explained above, whether non-dominant firms also implement a practice is *part of* the appropriate analysis to determine whether it amounts to competition on the merits. Ultimately, however, the clearest dividing line is whether the dominant firm's conduct is capable of excluding as-efficient rivals.

This has important ramifications for policy. Allowing firms to exploit advantages obtained on the market—as

opposed to government-granted privileges—may be precisely what stimulates those firms and their rivals to compete and innovate in the first place.⁵³ Self-preferencing is also at the core of certain franchising agreements, which have the advantage of allowing the rapid expansion of a successful brand.⁵⁴ In the specific case of Google, the 'Google Shopping Box' may provide a better experience by giving users a more direct answer, instead of forcing them to scour through hyperlinks and retype their query.⁵⁵ All of these scenarios may be pro-competitive.

In his opinion in *Intel*, AG Wahl argued that:

Experience and economic analysis do not unequivocally suggest that loyalty rebates are, as a rule, harmful or anticompetitive, even when offered by dominant undertakings. That is because rebates enhance rivalry, the very essence of competition.⁵⁶

If there remains insufficient empirical evidence to condemn an age-old practice like rebates without properly examining its ability to foreclose competitors, then policymakers should be particularly careful when drawing the boundaries for such comparatively novel practices as self-preferencing in digital markets.

In short, the *Google Shopping* ruling appears incompatible with the effects analysis that underpins Article 102 TFEU. It essentially rests on a *per se* prohibition that does not distinguish pro-competitive and anticompetitive exclusion, rather than the efficiency analysis imposed by *Intel*. It thus provides no way to draw a line in the sand separating self-preferencing practices that disadvantage competitors *and are also anticompetitive* from instances in which dominant undertakings favour their own (usually downstream) products to the disadvantage of competitors but *are not anticompetitive*.

At the time of writing, Google has appealed the GC's ruling.⁵⁷ It is more than likely that these distinctions

49 Dirk Auer, 'Case Closed: Google Wins (for now)' (*Truth on the Market*, 19 November 2021), available at <https://truthonthemarket.com/2021/11/19/case-closed-google-wins-for-now/> (Accessed 28 Nov. 2022).

50 See, e.g., Geoffrey Manne, 'Against the Vertical Discrimination Presumption' (2020) 2–2020 Concurrences 1. 'The notion that self-preferencing by platforms is harmful to innovation is entirely speculative. Moreover, it is flatly contrary to a range of studies showing that the opposite is likely true. In reality, platform competition is more complicated than simple theories of vertical discrimination would have it, and there is certainly no basis for a presumption of harm'.

51 *Servizio Elettrico Nazionale and Others*, para 79.

52 *Google Shopping*, para. 354.

53 Forcing those firms to share such advantages with rivals' might encourage them to slack off and free-load. See, in this respect, Opinion of AG Jacobs' opinion in Case C-7/97 *Oscar Bronner*, EU:C:1998:264. For a more detailed discussion, see, e.g., Dirk Auer, 'Appropriability and the European Commission's Android Investigation' (2017) 23 *Columbia Journal of European Law* 647.

54 Case 161/84 *Pronuptia*, EU:C:1986:41, para 15.

55 Jakob Kucharczyk, 'When Product Innovation Becomes a Competition Law Infringement: Preliminary Thoughts on the Google Shopping Decision', (2017) 1 *European Competition and Regulatory Law Review* 193; see also Geoffrey Manne, 'The Real Reason Foundem Foundered' (2018) ICL Antitrust & Consumer Protection Research Program White Paper 2018–2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384297 (Accessed 28 Nov. 2022).

56 Opinion of AG Wahl in Case C-413/14 P *Intel v Commission*, para 90.

57 *Appeal brought on 20 January 2022 by Google LLC and Alphabet, Inc. against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 10 November 2021 in Case T-612/17, Google and Alphabet v Commission* (Case C-48/22 P).

will be pivotal to that case. Among other things, Google argues that:

The General Court erred in upholding the Decision despite the Decision's failure to identify conduct that deviated from competition on the merits. . . . The General Court's additional reasons as to why Google did not compete on the merits are legally invalid.⁵⁸

Given what precedes, it goes without saying that the ECJ's conclusions on this point will be pivotal for the future of European competition law. In light of its *Intel* and *Servizio Elettrico Nazionale and Others* rulings, the ECJ's upper court has essentially two options.

The first would be to affirm the lower court's distinction between price and non-price conduct. This would be unfortunate. From a purely legal standpoint, it would amount to no less than a soft renunciation of *Servizio Elettrico Nazionale and Others* and a pruning of *Intel*. Furthermore, it would convey that the court's Article 102 case law has no clear direction and is not guided by clear overarching principles. From a more substantive perspective, this first path would create an unfortunate distinction between price-related conduct—assessed under a single unified framework—and the rest of Article 102, in which formalistic distinctions determine the idiosyncratic criteria under which types of conduct are ultimately assessed.

The second option would be for the court to confirm that the potential exclusion of AECs is a key part of the legal test for all conduct under Article 102. Not only would this conclusion safeguard the consistency of Article 102, but it would also give lower courts and competition authorities some guiding principle to assess whether novel conduct—such as self-preferencing—does or does not stem from competition on the merits. It would be insufficient for the Commission to prove (a) that a vertically integrated undertaking favours its own downstream products and (b) that this reduces the incentives of consumers to buy competing products. Accordingly, this second outcome would likely tee up so-called *renvoi* proceedings, where the General Court would reassess whether the Commission adduced sufficient evidence of anticompetitive foreclosure.

In short, there is every reason to believe that, when it is finally decided, the *Google Shopping* appeal will be a huge milestone for European competition enforcement.

V. Conclusion

European competition law has come a long way. From early cases like *United Brands* and *Hoffman*

Laroche—widely derided for their lack of economic literacy—the European judiciary has slowly crafted a coherent framework for Article 102 enforcement.

Although many failed to recognise it at the time, it is increasingly clear that the 2017 *Intel* ruling was a major catalyst of this upheaval. The ruling indicates that, for any given conduct under EU competition law, there needs to be a way to discern competition on the merits from anticompetitive conduct. In most cases, this includes asking whether the conduct under investigation is capable of excluding AECs. However, as we have explained throughout this article, this judicial revolution is not yet complete. Doubts persist concerning the exact scope of *Intel* and whether it is truly the lodestar that some (including us) make it out to be.

The upcoming *Google Shopping* ruling will likely be the bellwether that reveals the true legacy of *Intel* and the future direction of European competition law. The ECJ has an opportunity to clarify when self-preferencing is illegal under Article 102 TFEU. To do so, it must look at the broader implications and recognise that self-preferencing practices that disadvantage some competitors may nevertheless still be pro-competitive, and that the two must be differentiated.

Such an outcome might, however, prove somewhat bittersweet. With the DMA just around the corner, careful assessment of effects under the *Intel* framework will largely be a thing of the past in most digital markets. For instance, both Article 102 and the DMA cover 'self-preferencing practices', but under Article 102, a prohibition is subject to different standards, a higher burden of proof, and certain limiting principles that the DMA does not possess. By its own admission, the DMA cares little about the distinction between pro-competitive and anticompetitive conduct, or between competition on the merits and foreclosure, which it replaces with concepts such as fairness and contestability:

The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down rules to ensure contestability and fairness for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular.⁵⁹

This does not make *Intel* and its legacy any less important. With the DMA in force, it will be even more important for competition policymakers to understand the difference

⁵⁹ Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), point (7) of the preamble.

⁵⁸ *Id.*

between self-preferencing under Article 102 TFEU, which is not *per se* prohibited and which aims to protect competition to the benefit of consumers, and self-preferencing under the DMA, which aims to protect downstream competitors ('fairness'). By the DMA's own admission, these are two different things. The DMA's standards should not be unduly grafted unto competition law, even if it would be politically convenient to interpret longstanding EU competition-law principles in this still nascent and uncertain light.⁶⁰

The stage is thus set for the European Court of Justice to put the finishing touches on the *Intel* framework, thereby bringing much-needed clarity and consistency to Article 102. This would complete a remarkable turnaround for a body of law that has often been criticised for its lack of unity and economic proficiency. Whether or not this will ultimately prove to be a swan song—with the DMA attracting the bulk of enforcement—is another question.

<https://doi.org/10.1093/jeclap/lpac055>

60 Margethe Vestager has recently claimed the Apple Pay investigation would 'inform the future application of the Digital Markets Act. It will set a precedent with regard to the analysis of the security concerns, and a recipe for effective and proportionate access to NFC for mobile payments'. See European Commission, 'Remarks by Executive Vice-President Vestager on the Statement of Objections sent to Apple over practices regarding Apple Pay' (Brussels, 2 May 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_2773 (Accessed 28 Nov. 2022).