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COMPETITION, REGULATION AND TRADE E-BULLETIN

GENERAL COURT RULING IN THE INTEL APPEAL – WHERE NOW FOR AN EFFECTS BASED APPROACH TO REBATES UNDER ARTICLE 102 TFEU?

In today's Intel judgment ([case T-286/09](#)), the General Court continues its line of previous cases enforcing a strict approach to so called exclusivity rebates. Exclusivity rebates are designed as a financial inducement to ensure customers obtain all or most of their requirements exclusively from a dominant supplier. The General Court finds that, when granted by a dominant company, exclusivity rebates are by their very nature capable of restricting competition and foreclosing competitors from the market, without any need to assess the circumstances of the case in order to show that they (actually or potentially) have the effect of foreclosing competitors from the market.

The ruling will be a disappointment to those who may eagerly have anticipated that the Court might have moved away from its traditional, form based approach to rebate schemes, towards an effects based analysis under the 'as efficient competitor' test advocated by the Commission in its Guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct (the Guidance Paper). The Court explicitly rejects the need for the 'as efficient competitor' test (the AEC test) and finds that anti-competitive foreclosure can exist even where a competitor is still able to cover its costs despite the rebates, or where market entry remains possible but is made more difficult.

Background

In May 2009 the European Commission imposed a record fine of €1.06 billion on Intel for abusing its dominant position in the market for computer chips (X86CPUs, an essential component of all computers). The Commission found that, over a period of at least five years, Intel had sought to protect its 70% share of the global market for CPUs by:

- Offering anticompetitive rebates or other payments to incentivise customers (computer manufacturers) to buy all, or most of their computer chips from Intel; and
- Making payments to its customers to persuade them to hold up the launch of products containing CPUs produced by Intel's competitors and to sell exclusively computers containing Intel's X86CPUs.

In the Commission's view these practices were part of Intel's strategy

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intended to exclude its rivals from the market.

Intel appealed the decision, arguing that the Commission was wrong to find that the conditional rebates granted to its customers were abusive per se, that the Commission failed to meet the required standard of proof in its analysis of the evidence and challenging the level of the fine as manifestly disproportionate.

[^ Back](#)

Assessment of discounts and rebates under EU competition law

Discounts and rebates can be a controversial area in competition law. Whereas it is acknowledged that they may be part of legitimate price competition and lead to lower prices for consumers, there is also concern that they may be used by a dominant company as part of a strategy to exclude competitors and ultimately exploit customers. This is the case in particular in respect of loyalty inducing rebates, which are seen as a financial inducement given by a dominant company to its customers to obtain all or most of their requirements exclusively from that supplier, thereby denying other suppliers the opportunity to supply that customer.

Under the case law to date there has been no need to demonstrate a concrete anticompetitive effect on the market concerned in order for such rebates operated by a dominant company to qualify as an illegal abuse of a dominant position under Article 102 TFEU. Instead it is sufficient to demonstrate that the conduct in question is capable of having such an effect for there to be an infringement. This form based approach, under which certain rebate schemes operated by dominant companies can automatically qualify as an abuse, has often been criticised as being too rigid and failing to recognise the pro-competitive effect of some price reductions.

In February 2009 the Commission published its Guidance Paper, introducing a move towards a more effects based approach in its analysis of abuse of dominance under Article 102 TFEU. In respect of rebate schemes, as with other price based abuses, the guidance introduced, in principle, an assessment under the AEC test, which focuses on whether the conduct is likely to prevent competitors that are as efficient as the dominant company from expanding or entering a market. Although the Guidance Paper expressly provides that it is not intended to be a statement of the law and is without prejudice to the interpretation of Article 102 by the Court of Justice (CJEU) or the General Court, the European courts themselves have also been expected to move towards a more effects based approach in the application of Article 102 and have indeed done so in respect of other types of abuse.

[^ Back](#)

The Commission's analysis of Intel's rebate schemes

The General Court may of course have been influenced by the particularly stark facts:

- The terms on which Intel operated its rebate schemes were not put in writing and were not incorporated in its contracts with the various computer manufacturers.
- A range of evidence uncovered in the course of dawn raids at Intel's and its customers' premises and under subsequent requests for information indicated that the terms of the arrangements between Intel and its customers were such that computer manufacturers were concerned that even switching a small portion of some of their needs for CPUs to one of Intel's competitors was likely to result in a disproportionate loss of rebate from Intel and should be avoided at all cost.
- The thresholds for rebates were individual to each customer and led to a strong incentive to buy all or almost all their requirements from Intel. Customers evidently felt they had no choice.

Following a detailed analysis of all the evidence, the Commission

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concluded that Intel was operating a series of conditional rebate schemes in breach of Article 102 TFEU. The Commission's findings were based both on the traditional case law and on an economic analysis of the rebate schemes under the principles set out in its Guidance Paper.

The Guidance Paper was published after the Commission had issued the Statement of Objections in this case, and the Commission therefore considered that, in theory, it did not apply to this case. The Commission nevertheless went on to conduct an economic analysis and considered the capability of the rebates to foreclose an as efficient competitor, in order to demonstrate that the approach in its decision was also in line with that of its Guidance Paper.

Where the dominant company is, as was the case with Intel, an unavoidable trading partner whose product is of a "must-stock" nature, each customer will have a non-contestable share of demand where the product needs to be sourced from the dominant company, and a contestable share where the product can equally be purchased from one of its competitors. In such a case a rebate scheme enables the dominant company to use the non-contestable share of demand as leverage to decrease the price for the contestable share of demand. In order to establish whether the rebate scheme is capable of hindering expansion or entry by competitors that are as efficient as the dominant company, it is necessary to determine what price a competitor would have to offer in order to compensate the customer for the loss of the rebate.

For each of Intel's rebate schemes the Commission concluded that, in applying this test, it was clear that Intel's conduct was foreclosing competition on the relevant market. Some of the evidence relied on by the Commission indicates that one particular computer manufacturer could not afford to take CPUs from one of Intel's rivals even where these were offered for free, as the extent of the loss of the rebate would have been so great that these free CPUs could not compensate them.

[^ Back](#)

The Court's analysis

The Court categorises Intel's rebates as exclusivity rebates, as they are conditional on the customers obtaining all or most of their requirements from Intel. It goes on to find that such exclusivity rebates are by their very nature capable of restricting competition and foreclosing competitors from the market, without any need to assess the circumstances of the case in order to show that they actually or potentially have the effect of foreclosing competitors from the market. The Court rejects the need to apply the AEC test and finds that foreclosure can exist even where a competitor is still able to cover its costs despite the rebates, or where market entry remains possible but is made more difficult.

As for the Commission's effects based analysis, the Court also finds that it is not necessary to consider whether the Commission's decision is in line with the Guidance Paper, as this was adopted after the proceedings were initiated, and that the Commission simply carried out the AEC test for the sake of completeness.

For each of the rebate schemes the Court nevertheless carries out a detailed review of the evidence and the Commission's analysis and concludes that the Commission demonstrated to the requisite legal standard and according to an analysis of the circumstances of the case, that the exclusivity rebates were capable of restricting competition.

The Court upholds the Commission's decision, including the level of the fine, in its entirety.

[^ Back](#)

Comment

The General Court's ruling in the Intel case is the first ruling by one of

the European courts on rebate schemes assessed under the principles of the Commission's Guidance Paper. The Commission devoted a large part of its decision to the economic analysis under the as efficient competitor theory, possibly in order to allow the European courts to indicate their support for the effects based analysis in respect of rebates. It is not entirely clear whether the General Court rejects the relevance of the Guidance Paper on the basis of timing only (because the Guidance was adopted after the Commission had issued its Statement of Objections in this case) or whether it refuses to apply an effects based approach to this type of rebates as a matter of principle. Given the strong language in the judgment, it is probably the latter.

This approach is in contrast with the European courts' approach in respect of other types of abuse. In Post Danmark, a preliminary ruling from a Danish court which was adopted by the Grand Chamber of the CJEU, the CJEU took an effects based approach to selective price cutting behaviour applying the AEC test in its analysis. Similarly, in a number of margin squeeze cases, the European courts have been moving towards a more effects based approach, supporting, in principle, use of the AEC test. The General Court dismissed Intel's arguments that a similar approach should be adopted in this case on the basis that those cases relate to pricing practices and "do not affect the legal characterisation of exclusivity rebates".

The General Court also makes extensive reference to the Tomra case (CJEU ruling of 19 April 2012) which relates to exclusivity and rebates, in which the CJEU adopted the traditional form based approach, rejecting Tomra's arguments that the Commission should have carried out an effects based analysis of its rebates. Although this was widely believed to be because the Commission decision in this case was adopted in 2006, well before the Guidance Paper, there remained concern that the European courts may not support the Commission in its effects based approach to rebates. Today's ruling would seem to confirm this.

[^ Back](#)

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