
INTEL JUDGMENT EXPLAINED: AN INHOUSE PERSPECTIVE

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SOME COMMENTS ON THE ECJ INTEL JUDGMENT

- „Margrethe Vestager’s Intel problem“, „Intel wins retrial over €1.06 billion fine in setback for Commission“, „a victory for Intel’s lawyers“, „Intel verdict opens door to antitrust economists“, *Nicholas Hirst*, POLITICO
- „Intel ruling safeguards EU’s antitrust reach, but triggers procedural headache“, *Lewis Crofts*, MLex
- „Intel antitrust decision will shift EU regulator’s gaze to market reality“, *Matthew Newman*, Mlex
- „Intel Wins Round in Fight Over \$1.26 Billion Antitrust Fine“, *Stephanie Bodoni*, BloombergTechnology
- “Court orders Intel case review in EU antitrust blow”, *Michele Sinner, Foo Yun Chee*, Reuters

OVERVIEW

- Why does the sales manager like exclusivity or loyalty rebates?
- Where were we after the Intel decision and the General Court judgment?
- Risk assessment before and after the ECJ judgment.

REASONS FOR EXCLUSIVITY AND LOYALTY REBATES

- **Others do it!**
- **Customers want it!**

- Competing for exclusive customers;
- Achieving growth or revenue/sales targets;
- Simple and easy to implement;
- Volume rebates not an as attractive alternative:
 - Insufficient return on investment;
 - Insufficient to meet customer expectation.

EXCLUSIVITY REBATES SINCE INTEL

- At the time biggest fine ever imposed on a single company of €1.06 billion for certain fidelity rebates and so-called „naked restrictions“ including
 - Rebates conditional on obtaining all supplies or supplies for certain end products exclusively from Intel;
 - Rebates conditional on obtaining at least 95% or 80% of certain supplies from Intel;
 - Payments for selling only computers with Intel inside;
 - Payments to prevent or delay competitor sales.
- The General Court confirmed the Commission's Decision and held that „the question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect“ (para. 80) and that „exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of foreclosing competitors“ (para. 87).

RISK ASSESSMENT – INHOUSE PERSPECTIVE

- High risk of huge fines;
- No effects-based analysis by the General Court;
- Objective justifications are rare;
- Foreclosure analysis in the Discussion Paper never adopted;
- Guidance on the Commission's enforcement priorities focuses on factors when foreclosure will arise and when the Commission will intervene;
- Difficult to prove that exclusivity does not foreclose competition and no safe harbor.

RESULT: Too high risk, hardly any chance to defend – not worth it!

WHAT HAS CHANGED?

- ECJ confirms that „a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market“, para. 135, and
- „Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits“, para. 136,
- to then clarify (para. 138/139) previous case law that in cases where the dominant undertaking submits „that its conduct was not capable of restricting competition“ and „of producing the alleged foreclosure effects“ the Commission has to analyze:
 - **Market position;**
 - **Share of the market covered by the challenged practice;**
 - **Context, duration, amount of the rebate;**
 - **Strategy aiming to exclude as efficient competitors;**
 - **Any objective justification.**

REVISED RISK ASSESSMENT?

- High risk of huge fines;
- „General Court must examine all of the applicant’s arguments seeking to call into question the validity of the Commission’s findings concerning the foreclosure capability of the rebate concerned“ (ECJ para. 141)
 - AEC Test?
 - Market Coverage?
 - Context, duration?
- Objective justifications remain rare;
- Risk depends on the degree of likelihood required that the exclusivity rebate is capable of foreclosing competition.

RESULT: Too high risk, chances to defend still need further clarification – who wants to take the risk?

CONCLUSIONS

- The ECJ judgment is a welcome step in the right direction away from a *per se* prohibition of exclusivity rebates for dominant companies to a more nuanced analysis that slightly opens the door for rebates which are not capable of foreclosing competition.
- How far this door is open will depend on the degree of likelihood required that the exclusivity rebate is capable of foreclosing competition.
- Until the General Court will re-assess the application of the AEC test and all the other circumstances raised by Intel, exclusivity rebates remain too high risk for dominant undertakings.