

## CJEU RULES DOMINANT FIRMS' EXCLUSIVITY REBATES ARE NOT *PER SE* ILLEGAL

In its long-awaited *Intel* judgment, the Court of Justice of the EU (CJEU) ruled that the legality of a dominant firm's offer of rebates in return for exclusivity must be assessed by reference to that conduct's capacity to foreclose equally efficient rivals. The ruling clarifies that exclusivity rebates are not necessarily capable of foreclosing competition and mitigates risks for dominant businesses that are prepared to commit the time and resources to carrying out a legal and economic assessment of their planned rebate schemes.

### BACKGROUND

The case concerned the supply of x86 central processing units to original equipment manufacturers, such as Dell, Lenovo, HP, and NEC. AMD, the complainant, was also Intel's main competitor. In 2009, the Commission decided that Intel had abused its dominant position in the supply of those processors by (among other things) giving retroactive rebates to its customers that were *de facto* conditional on sourcing all or almost all of their inputs from Intel. The case also concerned direct payments to a major retailer which were conditional on only stocking PCs using Intel's processors.

On appeal, the General Court (GC) of the EU ruled that, unless "objectively justified", the offer of rebates that are conditional on a customer purchasing all or most of its requirements from a dominant company is illegal. Because such rebates "by their very nature" make it more difficult for rivals to sell to the relevant customers, said the GC, they were prohibited regardless of whether there is evidence that an equally efficient competitor could profitably have matched them, i.e. evidence that the rebates complied with the so-called "as efficient competitor" (AEC) test. While the GC recognised that such rebates may be "objectively justified" where necessary for the achievement of efficiencies and customer benefits that counterbalance or outweigh their competitive harm, Intel had not put forward any arguments that its rebates were objectively justified.

### THE JUDGMENT

The 6 September 2017 judgment of the Grand Chamber of the CJEU (which issues the court's most authoritative rulings) rejected the GC's assertion that exclusivity rebates are *per se* illegal, unless objectively justified.

In particular, the CJEU "further clarified" its 1979 judgment in *Hoffmann-La Roche*, and ruled that if a dominant company submits evidence that its

#### Key issues

- Dominant companies' exclusivity rebates are no longer considered *per se* illegal, unless objectively justified, under EU competition law.
- EU antitrust agencies and courts must consider evidence put forward by a dominant company that equally efficient rivals could profitably match its rebates - the so called "as efficient competitor" (AEC) test.
- The landmark ruling is unclear on a number of key points, in particular as regards the legal consequences of a finding that the AEC test is met.
- The judgment mitigates risks for dominant companies that offer exclusivity rebates, but the extent of that mitigation will depend on how it is interpreted by EU and national courts and authorities in the future.

conduct was not capable of foreclosing rivals, the Commission must assess not only the dominant company's market position, the structure, duration and market coverage of the rebate scheme but must also verify whether there existed a strategy to foreclose equally efficient competitors. It is implicit in the judgment's later findings that the evidence that a dominant company may produce to trigger this "capability assessment" includes an analysis of whether the rebates in question comply with the AEC test.

The CJEU also held that, even if a rebate system is capable of producing foreclosure effects, an analysis of its capacity to do so will still be relevant for the purposes of assessing whether it is objectively justified. If rebates have only a limited capacity for foreclosure, it is more likely that their harmful effects will be outweighed by any demonstrable efficiencies and consumer benefits.

The CJEU therefore sent the case back to the GC to consider whether Intel's rebates were, in fact, capable of restricting competition in light of the evidence in the Commission's decision regarding non-compliance of Intel's rebates with the AEC test and Intel's criticism of that evidence.

In places, the judgment seems to suggest that the GC was only required to consider arguments relating to the AEC test because the Commission had chosen to carry out that analysis "for completeness", despite considering it to be legally unnecessary. However, this should not be read as meaning that conduct complying with the AEC test can only ever be legal if the Commission chooses to consider evidence of that compliance, rather than asserting its irrelevance. The CJEU is the ultimate arbiter of the criteria for a breach of the prohibition on abuse of dominance, so the lawfulness of a rebate system cannot depend on some subsequent investigative discretion of the Commission. Rather, the judgment implicitly confirms that consideration of the AEC test is a legal requirement, in particular where a dominant company triggers a capability assessment by submitting evidence that the test is met.

## **IMPLICATIONS FOR BUSINESSES**

The judgment marks an important shift away from categorising the conduct of dominant companies as illegal by reference to its form and towards a greater requirement for proof of actual or potential anticompetitive effects.

However, for businesses looking for a clear statement of the law upon which to base their commercial pricing decisions, the judgment may be a disappointment. While admirably brief, it is not admirably clear, creating the possibility of various interpretations by EU and national courts and antitrust agencies in the future.

One interpretation is that the CJEU – by repeatedly citing its previous Grand Chamber judgment in *Post Danmark I* and emphasising that foreclosure of less efficient rivals is not necessarily anticompetitive – intended to promote the AEC test to become the primary determinant of whether a dominant company's rebate scheme is illegal. Moreover, the judgment omits any reference to the different categories of rebates that have been defined in previous case law (so-called "second" and "third category" rebates). This might be interpreted as implying that the CJEU's approach to assessing rebate schemes in *Intel* applies irrespective of whether the rebate is conditioned on a customer obtaining all or most of its requirements from the dominant company or is instead dependent on the customer meeting an individualised target for its volume or value of purchases - a distinction that may make little substantive difference in the real world, but has formed the basis for different legal tests in the prior case law of the EU Courts. That

would effectively elevate the Commission's 2009 exclusionary conduct guidance from an explanation of its administrative enforcement priorities to a statement of the law and would give businesses a relatively clear and objective test against which to assess their rebate schemes.

However, a more cautious interpretation of the text of the judgment suggests that exclusivity rebate schemes may continue to carry risks for dominant companies, even if compliant with the AEC test. In particular, nowhere does the judgment expressly state that compliance with the AEC test means that a rebate scheme is incapable of anticompetitive foreclosure.

Moreover, by requiring that exclusivity rebates are shown to be "incapable" of harmful effects, the CJEU might be viewed as having confirmed a different, higher standard for their assessment than that which has been applied in earlier CJEU case law (such as *Post Danmark II*) to "third category" rebates that are not expressly conditioned on exclusivity. For those rebates, the equivalent test is whether foreclosure effects are "unlikely", taking into account "all the circumstances" (including conditions of competition on the market – a factor that is omitted from the CJEU's description of the capability test). Even then, the AEC test is merely "one tool amongst others". While the CJEU's Advocate General had opined in the *Intel* case that the test for a rebate to be "capable" of having anticompetitive effects equates to a requirement that such effects will arise "in all likelihood", that involves such a linguistic stretch that the silence of the CJEU on this point cannot be assumed to be a tacit endorsement of the Advocate General's view.

Consequently, if exclusivity rebates are held to a more exacting standard, there will continue to be a risk that compliance with the AEC test does not, on its own, demonstrate that there is no capability of foreclosure at all and that such a capability might be inferred from other factors.

In addition, while the judgment means that compliance with the AEC test increases the prospects that a rebate scheme will be considered objectively justified, proving that the rebates in question are indispensable for the achievement of significant efficiencies and customer benefits will remain a daunting task.

## CONCLUSION

The ruling mitigates risks for dominant businesses that are prepared to commit the time and resources to carrying out a legal and economic assessment of their planned exclusivity rebate schemes. In particular, dominant companies face lower risks of private enforcement by rivals before national courts. The Commission has already committed that it will not, as a general rule, enforce the abuse of dominance prohibition against conduct that meets the AEC test, and many national antitrust agencies in the EU follow the same approach in practice. In contrast, national courts have no such administrative discretion and are required to follow rulings of the EU Courts which, until now, have all but required a finding of illegality for exclusivity rebates.

However, the judgment's lack of clarity on certain key points will mean that the extent to which it mitigates these risks will depend on how it is interpreted by EU and national courts and authorities in the future.

For Intel, more years of court battles with the Commission lie ahead. If the GC concludes that the AEC test was not met, or that it was but that Intel's rebate schemes nevertheless had the capacity to foreclose (e.g. because of a strategy aimed at foreclosing equally efficient rivals) the matter will no doubt

be appealed up to the CJEU once again. This continuing litigation before the GC and, possibly, the CJEU is likely to clarify further some of the ambiguities of the present judgment.

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