

Rewarding Loyalty: ECJ Holds that Loyalty Rebates Do Not Per Se Restrict Competition

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[Laurent De Muyter and Alexandre Verheyden, Jones Day](#)

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In short:

The Background: In September 2017, the European Court of Justice (Case C-413/14 P) reversed the ruling of the General Court, which had upheld the European Commission's €1.06 billion fine on Intel for abusing its dominant position on the market for x86 central processing units.

The Main Issue: The *Intel* case prompted much debate on whether loyalty/exclusivity rebates are *per se* abusive or if their effects on competition should be assessed in abusive conduct cases.

The Outcome: The judgment makes it clear that loyalty rebates issued by dominant undertakings are no longer considered as *per se* restrictive of competition. In the future, the Commission, national competition authorities, and national courts whose investigations are contested by dominant undertakings will need to assess all of the circumstances of a rebate scheme when determining its legality under Article 102 TFEU. The pursuit of such rebate cases is therefore more difficult now.

Finding of *Per Se* Abuse by the Commission and the General Court

In its 2009 Intel decision, the Commission asserted that rebates granted in exchange of exclusivity were per se abusive. The Commission also applied an “As-Efficient-Competitor” test (“AEC test”) to conclude that Intel’s rebate scheme constituted an abuse capable of foreclosing its main competitor.

In 2014, the General Court upheld the challenged Commission decision. However, the court discarded the need to apply the AEC test, stating that it was unnecessary to consider the effects of rebates. The General Court deemed, on the basis of the 1979 *Hoffman-La Roche* case, that fidelity rebates were “by their very nature” capable of restricting competition.

European Court of Justice Overturns Per Se Abuse Finding

Affirming the “By-Effect” Approach. The European Court of Justice (“ECJ”) set aside the General Court’s judgment for refusing to consider Intel’s arguments regarding the Commission’s application of the AEC test. While not formally overruling the *Hoffman-La Roche* case, the ECJ “clarifies” it as follows: when examining whether loyalty rebates issued by dominant undertakings are capable of restricting competition, the Commission must examine various elements, including: (i) the extent of the dominant position; (ii) the share of the market covered by the rebates; (iii) the conditions, duration, and amount of the rebates; and (iv) the existence of a strategy aiming at excluding as-efficient operators. In effect, the ECJ removed the per se illegality of loyalty/exclusivity rebates in *Hoffman-La Roche*.

Burden of Proof Applied to Dominant Undertakings. To avoid entirely overruling *Hoffman-La Roche*, the ECJ made a subtle distinction regarding the burden of proof—the Commission must conduct the effect-based analysis only where the dominant undertaking submits factual evidence during its investigation that the rebates are not capable of foreclosing as-efficient competitors. However, the level of detail that would be required from the dominant undertaking in order to trigger the Commission by-effect analysis is unknown at this time.

Furthermore, the ECJ recalled that the purpose of Article 102 TFEU is not to protect less-efficient operators and that not every exclusionary effect is necessarily detrimental to competition. It also expressly confirmed that efficiencies can be taken into account in an abusive conduct case. Therefore, even a rebate scheme that falls within the scope of Article 102 TFEU could be objectively justified by the

dominant undertaking.

Accordingly, the Commission must now consider the relevant evidence brought forward by the dominant undertaking in assessing both the restrictive effects of the rebates and the balancing of such restrictions with the alleged efficiencies.

Rights of Defense Reinforced. Intel had also invoked a violation of its rights of defense, as the Commission's evidence did not disclose an informal meeting held during the initial investigation between Commission officials and a senior executive of an Intel customer. Intel argued that the content of this meeting could have helped its defense, but the General Court denied its request for disclosure on the grounds that the Commission was required to record only formal meetings.

The ECJ ruled that the General Court erred in distinguishing between formal and informal meetings; however, the ECJ found that such error was not sufficient in itself to annul the Commission decision. Still, the ECJ's ruling will now force the Commission to record every interview that it conducts as part of its investigation, in order to respect the rights of defense of the parties.

Affirming Extraterritoriality of EU Competition Law. The ECJ rejected Intel's argument that the Commission lacked jurisdiction over rebates granted to Chinese companies for products mainly sold in China. In particular, the ECJ confirmed that the qualified effects test (i.e., assessing the qualified effects of suspect practices in the EU) could be used as a basis to establish jurisdiction, and that it was appropriate to examine the undertaking's conduct as a whole in order to determine the substantial nature of such effects on the European Union. The aim is to prevent conduct not adopted within the European Union from having anticompetitive repercussions on the EU market.

Next Steps

The ECJ referred the case back to the General Court, to assess Intel's arguments in light of the AEC test conducted by the Commission and to determine whether the challenged rebates were capable of restricting competition.

Three Key Takeaways

1. Loyalty rebates issued by dominant undertakings are no longer viewed as *per se* restrictive of competition (if their anticompetitive effects are contested by the

dominant undertaking), which will make their assessment by the Commission, national competition authorities, and national courts more complex.

2. Abusive rebate schemes under Article 102 TFEU can be objectively justified if they create efficiencies that outweigh their restrictive effects.

3. In the future, the Commission must record every meeting, whether formal or informal, conducted as part of its investigation in order to ensure the parties' rights of defense.

This post originally appeared on the [Kluwer Competition Law Blog](#).