

AG: General Court should resit exclusivity rebates test

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If it were up to Advocate General Wahl, the General Court would need to reassess its qualification of exclusivity rebates granted by computer chips producer Intel as per se unlawful. According to the AG, the General Court was wrong to create a 'super category' of rebates which by its very nature is abusive. Instead, all the circumstances of the case should be taken into account when assessing whether a rebate granted by a dominant company constitutes an abuse under Article 102 TFEU. The AG suggested that a more effects-based approach would provide dominant companies greater leeway when granting rebates to their customers. Still, it remains to be seen whether the European Court of Justice will favour the same approach on appeal.

The European Commission [imposed](#) a fine of EUR 1.06 billion on Intel for excluding competitors from the market for x86 central processing units (CPUs). The Commission found that Intel had abused its dominant position on this market by, among other things, granting rebates to computer manufacturers and to a European retailer on condition that they bought all, or almost all, their x86 CPUs from Intel. On [appeal](#), the General Court distinguished between three categories of rebates: (i) volume-based rebates, (ii) exclusivity rebates, and (iii) fidelity-inducing rebates. According to the General Court, once a rebate qualifies as an exclusivity rebate, there is no longer a need to consider all the circumstances to verify that the conduct is capable of restricting competition. That capability can then be assumed. Since Intel's conditional rebates constituted exclusivity rebates, the Commission no longer had to assess the circumstances of the case to establish that the rebates actually or potentially had the effect of foreclosing competitors from the market. The General Court therefore upheld the Commission's decision.

In his [opinion](#), Advocate General Wahl disagreed with the General Court's conclusion that exclusivity rebates constitute a separate type of rebates which are per se abusive. According to the AG, only two types of rebates follow from European case law: (i) volume-based rebates, and (ii) loyalty-rebates. Volume-based rebates are presumed lawful unless a full examination of their actual or potential effects proves otherwise. Loyalty-rebates are presumed unlawful. However, to determine whether a loyalty-inducing rebate constitutes an abuse, all the circumstances of the case will first need to be examined to ascertain whether the rebate is capable of anticompetitive foreclosure. That capability should show that the rebate does not just have ambivalent effects on the market or only produces ancillary restrictive effects. Instead, it should confirm the rebate's presumed restrictive effects. Without that confirmation, a full-fledged analysis has to be performed. The AG considered that the General Court also erred in the assessment of this capability by failing to establish, on the basis of all the circumstances, that the rebates offered by Intel had, in all likelihood, an anticompetitive foreclosure effect.

The AG therefore [recommends](#) that the European Court of Justice refer the case back to the General Court for an examination of all the circumstances of the case and, if necessary, the actual or potential effect of Intel's conduct on competition within the internal market.