

Intel: ECJ confirms effects-based approach to exclusivity rebates

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The European Court of Justice recently rendered its long-awaited judgment in the Intel case. The ECJ found that even though exclusivity and loyalty rebates may constitute abuse, the latter should be a rebuttable presumption only. The dominant company can refute this presumption by proving that its conduct was incapable of restricting competition, and the counterbalancing efficiencies which benefit consumers should be taken into account. At a preliminary stage, to determine whether a finding of abuse exists, the *as efficient competitor* test is applied. This test asks if the practice has the intrinsic capacity of foreclosing competitors which are at least as efficient as the dominant company. In this case, the ECJ told the General Court to re-examine Intel's arguments against the EUR 1.06 billion fine. The ECJ's ruling is a welcome confirmation of an effects-based approach to abuse of dominance. The disadvantage of this approach is that there are no clear rules applicable across all markets and in all circumstances. The advantage of this approach, however, is that certain dominant companies may have greater leeway when granting rebates to their customers; it all depends on the circumstances.

The European Commission [imposed](#) a EUR 1.06 billion fine on Intel for excluding competitors from the market for x86 central processing units (CPUs). The Commission found that Intel had abused its dominant position in this market by, among other things, granting rebates to customers on condition that they buy all, or almost all, of their CPUs from Intel. On [appeal](#), the General Court upheld the Commission's reasoning that once a rebate qualifies as an exclusivity or loyalty rebate, there is no longer a need to consider all the circumstances to verify that the conduct is capable of restricting competition; capability can be assumed. According to the General Court, it was therefore also not necessary to further look into the accuracy of the in-depth examination of the circumstances of the case, including the conducting of the *as efficient competitor* (AEC) test, which the Commission had carried out as a fall-back option in the General Court.

The [ECJ](#) agreed with Intel that the General Court erred in not examining its exclusivity and loyalty rebates in light of all the circumstances of the case. According to the ECJ, even though exclusivity and loyalty rebates are presumed to constitute abuse, this is a rebuttable presumption. The dominant company can refute it by providing evidence that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. If the dominant company succeeds in refuting this presumption, it is up to the Commission to conduct an AEC test to determine the foreclosure effects of the rebates concerned. Even though the Commission carried out the AEC test solely as a fall-back measure (as they assumed that the rebates would automatically be regarded as restricting competition, making the

AEC test redundant), once the test was carried out and formed part of the Commission's assessment, the General Court should have examined all of Intel's arguments in relation to that test. The ECJ therefore referred the case back to the General Court, giving it a second chance to review Intel's arguments relating to the AEC test.

Companies with a dominant position are now faced with the dilemma of whether to stick internally to hard and fast rules that could be overly restrictive in a particular case (for example, no retroactive or all-unit rebates), or to rely on a case-by-case assessment, taking into account all relevant circumstances and applying an AEC test, which may be difficult to implement in practice. De Brauw would be happy to provide further assistance on this issue.