



The Assessment of Rebate Schemes after the European Court's INTEL-Judgement

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Outline

- CJEU does not request policy change (I).
- CJEU *de facto* revokes (“clarifies”) *Hoffmann-La Roche* case law. In practice, even in case of exclusivity rebates, the Commission will have to examine all circumstances of the case and has already done so, e.g. in *Intel* (II).
- CJEU requires Commission to analyse, inter alia the
 - share of the market covered by the challenged practice and
 - a foreclosure strategy (III).
- CJEU does not request AEC test in rebate cases from the Commission (IV).
- CJEU does not clearly impose burden of proof on dominant undertaking with regard to objective justification (V).

Introduction – cont'd

13.5.2009: Commission's Intel-Decision

- Imposing a fine of €1.06 billion.
- Finding of exclusivity rebates according to *Hoffmann-La Roche* case law
- In addition (for the sake of completeness):
 - a) Detailed qualitative assessment of the rebates and
 - b) Application of “As efficient competitor” test (AECT)
- Finding of “naked restrictions”:
 - Direct payments granted to computer manufacturers in exchange for restricting marketing of products equipped with AMD CPUs.
 - Direct payments to Europe's biggest retailer Media-Saturn conditioned on its selling exclusively computers equipped with Intel CPUs.

Introduction – cont'd

General Court, 12 June 2014, T-296/09, Intel v. Commission

- Commission decision upheld.
- Distinction of three types of rebates:
 - Quantity rebates
... linked solely to the volume of purchases
... are generally considered not to have foreclosure effect
 - Exclusivity rebates (Commission: *'fidelity rebates within the meaning of Hoffmann-La Roche'*)
... (de facto) conditional upon purchase of all or almost all requirements
... incompatible with Art. 102 [unless objective justification]
 - Rebates with fidelity-building effects
... not containing any formal obligation to obtain all or a given proportion of supplies from the dominant undertaking
... consideration of all circumstances necessary

Introduction – cont'd

General Court, 12 June 2014, T-296/09, *Intel v. Commission* – cont'd
(cf. CJEU, *Hoffmann-La Roche*)

legal

illegal

**Quantity
rebates**

**Rebates with
fidelity-building
effects**

**Exclusivity
rebates**

**Exclusivity
contracts**

*consideration of
all circumstances
necessary*

Introduction – cont'd

General Court, 12 June 2014, T-296/09, Intel v. Commission – cont'd

Application to Intel's rebate scheme

- Qualification as “exclusivity rebates”
- By their very nature, capable of restricting competition.
- Commission was not required to make an assessment of the circumstances of the case in order to show actual or potential effect of foreclosure. Control of the Commission's assessment by GC only “for the sake of completeness”.
- Even less necessary: AEC test. No control at all by GC.

Court of Justice, 7 September 2017, C-413/14 P, Intel v. Commission

- Setting aside of GC's judgment and referral to GC.

I. No policy change required (“Goal of Article 102 TFEU”)

*“for the purposes of establishing an infringement of Article 82 EC, it is **not necessary** to demonstrate that the abuse in question had a **concrete effect** on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct in question is **capable of having or likely to have such an effect.**”*

GC, Case T-219/99 - British Airways, para. 239

I. No policy change required (“Goal of Article 102 TFEU”) – cont’d

*“[...] evidence, that its conduct was not **capable of restricting competition** and, in particular, of producing the alleged foreclosure effects.”*

*„The analysis of the **capacity to foreclose** [...]”, “analysis of the intrinsic **capacity** of that practice to foreclose competitors”*

*“the **foreclosure capability** of the rebate”*

*“**capable** of having foreclosure effects”*

CJEU, Intel, para. 138, 140, 141

II. Assessment of exclusivity rebates

Confirmation of Hoffmann-La Roche case law:

Per-se-illegality of exclusivity contracts and exclusivity rebates

*“[T]he Court has already held that an undertaking which is in a dominant position on a market and ties purchasers [...] by an obligation or promise on their part to obtain all or most of their requirements **exclusively** from that undertaking abuses its dominant position within the meaning of Article 102 TFEU [...]. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies [...] a system of **loyalty rebates**, that is to say, **discounts conditional on the customer’s obtaining all or most of its requirements [...]** from the undertaking in a dominant position (see judgment of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, para. 89).”*

CJEU, Intel, para. 137

II. Assessment of exclusivity rebates – cont'd

*“However, that case-law must be **further clarified** in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was **not capable of restricting competition** and, in particular, of producing the alleged foreclosure effects.”*

CJEU, Intel, para. 138

*“In that case,” [...] “an **analysis of all circumstances of the case**” is necessary (see criteria above).*

CJEU, Intel, para. 139 and 142

II. Assessment of exclusivity rebates – cont'd

- Dichotomy between by object and by effect abuse similar to the distinction in Art. 101 TFEU?
- Introduction of a procedural right to challenge a presumptive allegation of harm to competition (including the obligation imposed on the competition authority to review it).
- Which undertaking would not try to raise an objection and support evidence that its behavior is not capable of restricting competition?

II. Assessment of exclusivity rebates – cont'd

CJEU, 6 September 2017, *Intel*, para 138

legal

illegal

**Quantity
rebates**

**Rebates with
fidelity-building
effects**

**Exclusivity
Rebates**

**Exclusivity
contracts**

consideration of all circumstances necessary

II. Assessment of exclusivity rebates – cont'd

*“However, that case-law must be **further clarified...**”*

Does probably also apply to **pure exclusive dealing** as also mentioned in the foregoing paragraph:

*“[T]he Court has already held that an undertaking which is in a dominant position on a market and ties purchasers [...] by an **obligation or promise** on their part to obtain all or most of their requirements **exclusively** from that undertaking abuses its dominant position within the meaning of Article 102 TFEU [...]. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies [...] a system of **loyalty rebates**, that is to say, **discounts conditional on the customer's obtaining all or most of its requirements [...]** from the undertaking in a dominant position [...].”*

II. Assessment of exclusivity rebates – cont'd

CJEU, 6 September 2017, *Intel*, para 138

legal

Illegal ?

**Quantity
rebates**

**Rebates with
fidelity-building
effects**

**Exclusivity
Rebates**

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consideration of all circumstances necessary

II. Assessment criteria – cont'd

The Bundeskartellamt takes another view on exclusive dealing:

*„Diese europäische Rechtsprechung zum Per-Se-Verbot von Ausschließlichkeitsbindungen des Marktbeherrschers wurde auch nicht durch die jüngste EuGH-Entscheidung in Sachen Intel modifiziert oder aufgegeben. Soweit der EuGH hier die Nachweisanforderungen für die Wettbewerbsbehörden konkretisiert, bezieht er sich ausschließlich auf vom marktbeherrschenden Unternehmen angebotene Rabatte und **nicht auf vertraglich vereinbarte Ausschließlichkeitsbindungen.**“*

BKartA, 4 December 2018, B 6 – 132/14-2, CTS EVENTIM, para. 250

II. Assessment criteria – cont'd

Arguments of the Bundeskartellamt:

- Clarifications in paras 138 of judgment seq. only fit with rebates, not exclusivity contracts („conditions and arrangements for granting the **rebates** in question”).
- Judgment only applicable to Art. 102 TFEU, not to § 19 GWB.
- Significant difference between contractual obligation of exclusivity and unilateral commitment to grant a discount in exchange for exclusivity. In the latter case, the foreclosed market share is variable depending on the decision of the tied customer.
- Thus, higher risk of harm to competition. Therefore, exclusivity contracts also prohibited even Art. 101 TFEU (independently of dominance).

II. Assessment criteria – cont'd

*“However, that case-law must be further clarified in the case where the undertaking concerned submits, during the **administrative procedure**, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.”*

CJEU, Intel, para. 138

- What about the burden of proof in (the rare cases) of private stand-alone (damages) actions before national courts?
- Exculpatory evidence has to be submitted during administrative proceedings. Dominant undertakings may not wait until the judicial proceedings.

III. Assessment criteria

“In that case, the Commission is not only required to analyse,

*[1] first, the **extent of the undertaking’s dominant position** on the relevant market and,*

*[2] secondly, the **share of the market** covered by the challenged practice,*

*[3] as well as the **conditions** and arrangements for granting the rebates in question, their **duration** and their **amount**;*

*[4] it is also required to assess the possible existence of a **strategy aiming** to exclude competitors that are at least as efficient as the dominant undertaking from the market.”*

CJEU, Intel, para. 139

→ Surprising order. Conditions for granting of rebates and share of the market covered are the most important criteria. AEC test not mentioned.

III. Assessment criteria – cont'd

*“The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The Commission considers the following **factors** to be generally relevant to such an assessment:*

- *the position of the dominant undertaking;*
- *the conditions on the relevant market;*
- *the position of the dominant undertaking's competitors;*
- *the position of the customers or input suppliers;*
- *the extent of the allegedly abusive conduct;*
- *possible evidence of actual foreclosure;*
- *direct evidence of any exclusionary strategy. [...] ”*

Commission, Guidance Paper 2009, para. 20

III. (Traditional) assessment criteria in rebate cases – cont'd

- Individualised threshold adapted to the presumed purchases of trading partners
- Rebate only subject to an increase in purchase compared to the previous reference period
- Big jumps in the rebate rate, high rebate thresholds as well as strong progressively increasing rebate
- Retrospective rebate (higher rebates applies not only to the incremental purchases but to all purchases)
- Long reference period (more than 12 months: generally doubtful; less than 3 months: generally fine)
- Group commitment rebate (all or several group undertakings concerned)
- Transparency of rebate systems
- Selectivity of rebate systems (applied to important customers of competitors)
- English clause (cannot be put forward as a defense)

III. Assessment criteria – cont'd

“share of the market covered by the challenged practice” (INTEL)
= viable share for competitors? *De-minimis*-threshold?

*“[T]he foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the **contestable part of the market** is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors **should be able to compete on the merits for the entire market and not just for a part of it**. Second, it is not the role of the dominant undertaking to dictate **how many viable competitors will be allowed** to compete for the remaining contestable portion of demand.”*

III. Assessment criteria – cont'd

“share of the market covered by the challenged practice” (INTEL)
= viable share for competitors? *De-minimis*-threshold?

*“As regards the appellants’ argument that the Commission should have applied the ‘**minimum viable scale**’ test, suffice it to observe that, first, the General Court was correct to hold that the **determination of a precise threshold of foreclosure of the market** beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 102 TFEU [...]”*

CJEU, C-549/10 P – Tomra Systems, para. 46

III. Assessment criteria – cont'd

“(large) share of the market covered by the challenged practice” (INTEL)
= indicating the likelihood of exclusionary effects?

*“The fact that the rebates applied by Post Danmark concern a **large proportion of customers on the market** does not, in itself, constitute evidence of abusive conduct by that undertaking. [...]*

*However, the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a **useful indication** as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anticompetitive exclusionary effect.”*

CJEU, Post Danmark II, para. 44 - 46

IV. Significance of AEC test

*“The as-efficient-competitor test must thus be regarded as **one tool amongst others** for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.”*

*“Consequently, the answer to the third and fourth subparagraphs of Question 1 is that the **application of the as-efficient-competitor test does not constitute a necessary condition** for a finding to the effect that a rebate scheme is abusive under Article 82 EC. In a situation such as that in the main proceedings, applying the as-efficient-competitor test is of no relevance.”*

CJEU, Post Danmark II, para. 61 and 62

IV. Significance of AEC test – cont'd

*“If, in a decision finding a rebate scheme abusive, **the Commission carries out such an analysis**, the 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.”*

CJEU, Intel, para. 141

IV. Significance of AEC test – cont'd

*“[I]n the decision at issue, the AEC test played an **important role in the Commission’s assessment** of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.*

***In those circumstances**, the General Court was required to examine all of Intel’s arguments concerning that test.”*

CJEU, Intel, para. 143 and 144

IV. Significance of AEC test – cont'd

Will it be useful to present evidence in form of AEC analysis? Can the dominant undertaking urge the competition authority to discuss AEC evidence?

Cf. Bundeskartellamt's attitude in the EVENTIM CTS-case:

„Inwieweit der von CTS mit einem Gutachten eingereichte [AEC] Test im Übrigen aufzeigen kann, ob die Exklusivitätsvereinbarungen tatsächlich keine Verdrängungswirkung aufweisen, ist zu bezweifeln, kann hier aber offenbleiben.“

BKartA, EVENTIM CTS, para. 250

V. Objective justification

*“The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be **objectively justified**. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of **efficiency** which also benefit the consumer [...]. That **balancing** of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision **only after an analysis of the intrinsic capacity of that practice to foreclose competitors** which are at least as efficient as the dominant undertaking.”*

CJEU, Intel, para. 140

→ Reaffirmation of the availability of an efficiency defense to a dominant undertaking in the absence of an explicit legal basis in Art. 102 TFEU.

V. Objective justification – cont'd

*“... it is **for the dominant undertaking to show that***

[1] the efficiency gains likely to result from the conduct under consideration

[2] counteract any likely negative effects on competition and consumer welfare in the affected markets,

[3] that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and

[4] that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.”

CJEU, Post Danmark I, para. 42

V. Objective justification – cont'd

- According to *Post Danmark I* and *II*, the dominant undertaking bears the **burden of proof**. No more mentioned in *Intel* (“balancing [...] in the Commission’s decision” is necessary).
- Nor does *Intel* explicitly mention the four criteria laid down in *Post Danmark I* and *II*.

Closing remarks

- CJEU's Intel-decision does not incline in favour of an effects based approach.
- CJEU *de facto* unifies assessment of rebates and even of exclusivity contracts. Commission (and NCA) will generally assess all circumstances of the case, even in the case of exclusivity contracts and “exclusivity rebates”. The latter category will disappear in practice.
- CJEU maybe started to revoke its holding in *Tomra* according to which the fixation of a *de minimis* threshold is not justified.
- CJEU does not lay 3131down any obligation on the Commission to apply the AEC test.
- Dominant undertakings will nevertheless try to bring evidence in form of AEC analysis and thus try to urge the Commission and NCAs to react. However, they are not obliged to do that.

**Danke für Ihr Interesse und Ihre
Aufmerksamkeit!**

**Thank you for your interest and your
attention!**



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