The Treatment of Fidelity Rebates According to the Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009): Thoughts Concerning the C-413/14 P Judgment, Intel Corporation Inc. v. European Commission

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Konstantina Sideri (https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2759246)
affiliation not provided to SSRN

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Abstract

Competition is the core around which the market moves and operates, helping the market operators to be more efficient. It is only in these conditions that the opposing interests of economic units do not confuse the market. Undoubtedly, in the context of fair competition, lower prices are achieved, the quality of products and/or services are improved, and businesses are aiming for maximum efficiency. For all these reasons, competition law is of great importance and it is characterised as the “charter of the rights and obligations of the undertakings”. The dominant position constitutes one of the main subjects of competition law and, in combination with a rebate scheme, is a highly controversial issue which can distort free competition.

Keywords: eu competition law, abuse of dominant position, article 102 TFEU

The treatment of fidelity rebates according to the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009)

Thoughts concerning the C-413/14 P judgment, Intel Corporation Inc. v. European Commission

Konstantina E. Sideri
Attorney at law/EU Qualified lawyer
LLM Candidate in International Business Law, Université Libre de Bruxelles, Faculty of Law, Brussels, Belgium
MA in European Law & Public Policy with concentration in EU Competition Law, Panteion University of Social and Political Sciences, Athens, Greece
LLB in Democritus University of Thrace, Law School, Komotini, Greece

Abstract

Competition is the core around which the market moves and operates, helping the market operators to be more efficient. It is only in these conditions that the opposing interests of economic units do not confuse the market. Undoubtedly, in the context of fair competition, lower prices are achieved, the quality of products and/or services are improved, and businesses are aiming for maximum efficiency. For all these reasons, competition law is of great importance and it is characterised as the "charter of the rights and obligations of the undertakings".[1] The dominant position constitutes one of the main subjects of competition law and, in combination with a rebate scheme, is a highly controversial issue which can distort free competition.

A. The creation of dominant position

The creation of economic power raises many objections regarding whether and to what extent pressure should be exerted on the dominant undertaking by competitors and ultimately whether its autonomy leads to negative effects on competition[2] concerning the

[1] *Triantafyllakis,* Free Competition Law, 2nd edition, 2012, 15.
[2] *Bishop S. & Mardsen Ph*., "The Article 82 Discussion Paper: A Missed Opportunity", ECJ 2006, 1, "…The criticisms of the current approach relate primarily to the current approach to the assessment of abuse. When

competitors (excluding them from the market) and the consumers (offering products and/or services of lower quality but at higher prices).

The prohibition on a dominant position was a basic provision of the founding treaties of the European Union, as one of the prime objectives of the Union's founding fathers was to ensure a regime of undistorted competition within the internal market. As a result of the amendment of the Treaties (ex Article 86 EEC, formerly Article 82 TEC, now embodied in the current Article 102 TFEU), this prohibition is part of primary law and retains unchanged content, with the aim of controlling the policy or strategy of the dominant undertakings within the market. In particular, an undertaking is considered to have a dominant position within the meaning of the above-mentioned article when it holds a position of economic power enabling it to prevent the maintenance of effective competition on the relevant market in which it operates and to modify its business behaviour in full independence.

It should be mentioned that the creation of a dominant position in the market is not unlawful; Article 102 TFEU merely lays down a limit on the holding or acquisition of a dominant position by prohibiting its abuse by one or more undertakings within the common market or a substantial part of it. The term "abuse" is objective, due to the fact that the behaviour of the dominant undertaking is the crucial element of its assessment, not its motives or its scopes.

Indeed, in the Hoffmann-LaRoche judgment, the European Court of Justice (ECJ) ruled that "*the concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".*[3]

assessing the conduct of dominant firms, the Commission, supported by the Courts, has tended to focus on the form of the conduct rather than its competitive effects…", and *Neils G & Jenkins H.*, "Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down?", ECLR 2005, 606.

[3] C- 85/76, Hoffmann-LaRoche v. European Commission, 1979, 00461, par. 91.

Furthermore, the provisions of Article 102 TFEU attempt to ex-post, not to ex-ante the existing monopoly or almost monopoly power on the market, whether exercised individually or collectively. The dominant position is, therefore, not per se prohibited, but it is considered to be potentially harmful to competition and, therefore, creates a "special responsibility" regime for third parties.[4]

B. The definition of per se prohibited rebates

The Union Courts have faced various cases concerning rebates. Rebates can be categorised into "single-product rebates" and "multi-product rebates" or "mixed-bundling". The discount policy of a dominant undertaking can be manifested in a plethora of ways, combined with other forms of abusive pricing and non-pricing practices.

The European Commission and the case law of the ECJ distinguish three types of discounts on a product which are purely linked to the fidelity/loyalty of the business's customers and may lead them to abuse. Therefore, we have exclusivity rebates, target rebates and rebates which are granted within discriminatory pricing and cannot be characterised from the outset as either exclusivity rebates or target rebates, but which pose the risk to strengthening customers' loyalty and foreclosing competitors and they are, therefore, considered to be abusive because of the effect they may have on the market.

B.1 Exclusivity rebates

This type of rebate is granted on the condition that the customer will cover all or a substantial part of his needs for a certain period of time by the dominant undertaking. In particular, the dominant undertaking grants quantity rebates in order to enhance the fidelity of its customers but, combined with exclusive purchasing agreements, leads the dominant undertaking to exploit its advantageous position on the market by distorting free

[4]*Niels G. & Jenkins H.*,"Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down", ECLR 2005, 605, and T-203/01 Manufacture française des pneumatiques Michelin v. European Commission (Michelin II), 2003, II-04071.

competition. For this reason, these rebates are treated by the European Union as "per se" abusive.[5]

In the European Sugar Cartel case[6] the ECJ for the first time referred to fidelity rebates as a violation of Article 86 (present 102 TFEU) and pointed out that "*this way of conceiving a rebate disregards the fact that the rebate at issue is not to be treated as a quantity rebate exclusively linked with the volume of purchases from the producer concerned but has rightly been classified by the commission as a 'loyalty' rebate designed, through the grant of a financial advantage, to prevent customers obtaining their supplies from competing producers.*"[7]

The basic rule in this type of rebate came from the examination of the Hoffmann-La Roche[8] vitamin case. In that judgment, the ECJ reiterated and further refined its position in the European Sugar Cartel case,[9] stating that the rebates clauses, as they lead to the exclusive supply of counterparts by the granting company, impinge on the prohibition of abuse the dominant position. Furthermore, the ECJ pointed out that the aforementioned abuse is irrelevant to the fact that these rebates are granted at the request of the purchaser and it considered that the essence of the infringement is based on the creation of an exclusive supply relationship rather than whether and to what extent that exclusivity is rewarded or "accompanied" by rebates.[10]

The ECJ and the subsequent judgment in the BPB Industries/British Gypsum case[11] concluded that rebates based on the calculation of the customer's demand for a particular item of goods of a dominant undertaking, which are offered by the dominant undertaking in order to "tie" their customers, are considered abusive. In particular, the Court reiterated its basic position, which was stated in the Hoffmann-LaRoche judgment, and added that the signing of exclusive supply contracts covering a significant proportion of the markets constituted an unacceptable barrier to entry in that market.[12]

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[5] *Whish R.*, Competition Law, 7th edition, 2012, 730.
[6] C-40-48,50,54-56,111,113-114/73, Suiker Unie UA v. European Commission, 1975, I-1663.
[7] Ibid., par. 518.
[8] C-85/76, Hoffmann-LaRoche v. European Commission, 1979, 461.
[9] C-40-48,50,54-56,111,113-114/73, Suiker Unie UA v. European Commission, 1975, 01663.
[10] *Karagiannis V.*, Fidelity rebates agreements according to Community Competition Law, Greek DEE 2007, 1271.
[11] C-310/93 P BPB Industries/British Gypsum v. European Commission, 1995, I-865.
[12] T-65/89, BPB Industries & British Gypsum v. European Commission, 1993, II-389, par. 68

B.2 Target rebates

Target rebates are also a case of discounts that are granted in return for a customer's fidelity to the supplier despite the fact that it is not clear that the purpose of granting them is to enhance customer fidelity.[13] This type of rebate aims to create a strong bond of dependence between the customers and the dominant company and thus impede barriers to its competitors, real or potential. Their allocation is conditional upon the individual sales targets of each customer. The individualised target is typically linked either to the purchases that the customer has made in a given reference period or to the expected or predominantly total or almost total needs of the dominant undertaking.

The Michelin I[14] case was the basis for interpreting the practice of granting target rebates by the European Commission and the EU Courts.[15] Indeed, the ECJ has made it clear that individual target rebates are abusive during a given reference period, but it does not explain how customers feel pressure within a reference period, notably at the end of it, and why the general trend, that any discount scheme that refers to a certain period of time is, for that reason, only abusive, should be drawn.[16]

Following, in the Michelin II case, the Commission stated in its decision[17] that *"any system under which rebates are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the foreseeable loss for the entire period"*.[18]The Court of First Instance of the European Communities ratified[19] the Commission's decision and stressed that *"it follows that, for the purposes of applying Article 82 EC, establishing the anti-competitive*

[13]*Whish R.*, Competition Law, Eighth Edition, Oxford University Press, 2015, 774; *Jones A. and Sufrin B.*, EU Competition Law, Text, Cases, and Materials Sixth Edition, Oxford University Press, 2016, 446.
[14]C-322/81, Nederlandsche Banden Industrie Michelin (Michelin I) v. European Commission, 1983, 03461.
[15]*Snijders W.L.*, Case 322/81, Nederlandsche Banden-Industrie Michelin v. Commission [1984] E.C.R. 3461. The Michelin Judgment, CMLR 1986, 193.
[16]*Gyselen Luc*, Rebates: Competition on the Merits or Exclusionary practice?, 8th Competition Law and Policy Workshop, European University Institute, June 2003, 30 (and to European Competition Law Annual: What is an abuse of a Dominant Position?, Hart Publishing of Oxford).
[17] Commission Decision 2002/405,20th June 2001, Official Journal of the European Communities 2002 L 143, 1.
[18] Ibid., par. 228.
[19]T-203/01, Manufacture française des pneumatiques Michelin v. European Commission (Michelin II), 2003, II-4071.

object and the anti-competitive effect are one and the same thing. If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect".[20] This view of the Court of First Instance reiterates the provision of Article 101 TFEU (previous Article 81 EC) and the separation therein between acts which have as their object or effect the prevention of competition. However, the ECJ has already recognised that, under Article 102 TFEU (previous Article 82 EC), such separation does not arise, but only the negative effect is required. Since the Commission has succeeded in showing that Michelin's commercial policy was intended to attract the fidelity of its customers, and this result has created a restriction of competition through the great difficulty that has arisen for the viable operation of actual and potential competitors, there is no need for further evidence of the abuse.[21] Therefore, in the case of Michelin, the target rebates were found to be abusive because of the following characteristics: firstly, the annual reference period – which was considered to be a relatively long period – secondly, the fact that the discounts were calculated on the total turnover during the reference period and not only on additional purchases above the target limit and, thirdly, the fact that more discount systems (no pricing) operated at the same time did not allow the customer to calculate the exact purchase price of the tyres at the time of realisation and it implies the uncertainty and dependence on Michelin.

The ECJ, in the case of Virgin/British Airways,[22] indicated that a discount system whose percentage increases in relation to the volume purchased is not contrary to Article 82, unless the criteria and method of granting such deductions show that the system is not based on an economically justifiable consideration but, as in the discount for loyal customers and volume rebates, intends to prevent the supply of customers to competing producers. In this case, the EU courts proceed to an extensive interpretation regarding the ban of the current Article 102 TFEU on incentives to enhance customer fidelity.[23] Advocate General Juliane Kokott, in his Opinion in the ECJ's appeal, extensively analysed the view of a later examination of the condition of the existence of an objective justification,[24] which

[20] Ibid., par. 241
[21] *Kallaugher J. & Sher B.*,Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82, ECLR 2004, 263.
[22] C-95/04 P, Virgin/British Airways v. European Commission, 2007, I-2331.
[23] *Odudu O.*, Case 95/04 P, British Airways plc v. Commission, judgment of the Court of Justice (Third Chamber) of 15 March 2007, nyr., CMLR 2007, 1781.
[24] Opinion of Advocate General Juliane Kokott, par. 56-62, regarding to C-95/04 P, Virgin/British Airways v. European Commission, 2007, I-02331.

the ECJ also endorsed in its judgment,[25] thus endorsing the judgment of the Court of First Instance that *"the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors".*[26]Concerning the foreclosure of competitors, the Court followed the thoughts it had put forward in the case of Michelin II.[27] The Court agreed with the European Commission that *"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 is capable of having, or likely to have, such an effect".*[28]

B.3 Rebates considered to be abusive because of the effect they may have on the market

Apart from the aforementioned types of rebates, there is another type of rebate which has arisen from EU case law and cannot be characterised clearly as either an exclusivity rebate or a target rebate, but because of its effects on the market and, therefore, on competition and the fact that it is granted by dominant undertakings, leads to foreclosure on competitors and at the same time strengthens the loyalty of customers to dominant undertakings.[29] There is no coincidence that the ECJ itself in British Airways adopted an extensive interpretation of the concept "foreclosure effect". In particular, it was clarified that the earlier judgments, i.e. Hoffmann-LaRoche (exclusivity rebates) and Michelin (target rebates) are incidental, which implies that there are other types of rebate that can enhance customer loyalty if they involve foreclosure on competitors of the dominant undertaking,[30] and it was emphasised that the definition of the "foreclosure effect" allows the assessment of non-contractual factors (e.g. market shares).

[25] C-95/04 P, Virgin/British Airways v. European Commission, 2007, I-02331, par. 69.
[26] C-95/04 P, Virgin/British Airways v. European Commission, 2007, I-02331, par. 75, *Kikini E.*, DEK Ypoth. C-95/04 P, apof. tis 15.3.2007, Greek DEE 2007, 1064.
[27]T-219/1999, British Airways v. European Commission, 2003, II-5917, par. 241-247.
[28] Ibid., par. 293.
[29]*Ridyard D.*, Exclusionary Pricing and Price Discrimination, Abuses under Article 82 – An Economic Analysis, ECLR 2002, 286, especially 292-293.
[30]Contrary to BA's argument, it cannot be inferred from those two judgments that bonuses and discounts granted by undertakings in a dominant position are abusive only in the circumstances there described. As the Advocate General has stated in point 41 of her Opinion, the decisive factor is rather the underlying factors

Price discrimination may involve primary line or secondary line injury. Primary line injury prejudices the supplier's competitors. Price discrimination can cause primary line injury by having exclusionary (foreclosure effects) on competitors. For example, in Irish Sugar[31] and in Compagnie Maritime Belge,[32] the dominant undertakings pursued selective (and therefore discriminatory) low pricing policies in order to exclude their competitors. Secondary line injury is where the impact is in downstream markets, between the supplier's customers or third parties inter se. If a supplier sells a product to X more cheaply than to Y, and X and Y are competing manufacturers who need the product as an input, then X's costs will be lower than Y's. The supplier will have distorted competition between them.[33]

C. The reference period

The reflection on the reference period, which is an integral part of almost all the rebate schemes, which have been judged under competition law, has two axes. The first concerns the existence of the reference period that creates or strengthens the problem in competition, and the second concerns the duration of the reference period and the consequences that it may bring about. Unfortunately, the current confusion in relation to the role, the value and the duration of the reference period has been created and yet strengthened by the inconsistent and incomplete addressing of the issue by the European Commission and the EU Courts. Indeed, different reference periods have been allowed in different cases.[34]

Is it through this inconsistency in dealing with the reference period that a more proper way of dealing with this problematic? Since each market has a different structure and different rules, can there be a single timeframe acceptable for the reference period? Should the reference period be examined and judged ad hoc according to the actual facts of each case?

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which have guided the previous case-law of the Court of Justice and which can also be transposed to a case such as the present, C-95/04 P, Virgin/British Airways v. European Commission, 2007, I-02331, par. 64.

[31]T-228/97, Irish v. European Commission, 1999, II-2969.

[32]T-24/93, Compagnie Maritime Belge Transports SA v. European Commission, 1996, II-1201, and C-395&396/96, Compagnie Maritime Belge Transports SA v. European Commission, 2000 I-1365.

[33]*Jones A. and Surfin B.*, EC Competition Law, Text, Cases, and Materials 3rd edition, Oxford University Press, 2008, 442.

[34]*Sher B.*, Price Discounts and Michelin 1: What Goes Around, Comes Around, European Competition Law Review (ECLR) 2002, 482.

Furthermore, the Commission condemned the target rebates scheme (which was higher than in any previous period) based on the calculation of the customers' needs for a certain reference period of any duration (weekly, monthly, yearly). The ECJ confirmed the Commission's attitude by making no reference to any duration of reference period required, as the previous judgment of the same Court in Michelin I required the period to be "relatively long".[35]

The obvious contradiction can be interpreted in two possible ways. According to the former, the European Court of First Instance agrees with the Commission; it rejects the position it held previously in the Michelin I case, and it prefers, as the only option, that the discount is given individually per order. The latter way of interpreting the Court's thinking seems to place emphasis only on the "increase" required by the scheme in question and not on the reference period itself. In this sense, the position of the Court of First Instance in the Michelin I case remains unchanged. It is important, therefore, that customers exceeding the target not only maintain loyalty ties with the dominant undertaking, but that they increase it in relation to the past, thereby intensifying the customer loyalty ties with the dominant undertaking.[36]

The longer the expected duration of the reference period, the more concerned the Authorities and the Courts are. The concern is relative to the similarity in dealing with rebates on the one hand and exclusivity agreements on the other hand in competition law, when they come from a dominant undertaking. The way that the duration of an exclusivity agreement contributes to the final judgment concerning its legality is the same way defines that as longer the duration of the reference period is, the more the rebates scheme is been burden. For instance, rebates that depend on "loyal" markets are more likely to result in foreclosure on the competitors in the market, when they are calculated on a five-year period than on a period of just one year. According to the thoughts of the Commission in the Michelin I case, indeed, the long reference period enhanced the customer's uncertainty regarding the final price of the tyres, but also, the closer the end of the reference period came, the greater was the customer's incentive to buy tyres from Michelin.[37]

[35]C-322/81, Nederlandsche Banden Industrie Michelin (Michelin I) v. European Commission, 1983, 03461, par. 81.
[36]*Gyselen*,par. 92.
[37]*Roques C.*, CFI Judgement, Case T – 203/01 Manufacture française des pneumatiques Michelin v. Commission, ECLR, 2004, 688, especially 692.

In any case, the duration of the reference period can be considered only as an aggravating factor taking into consideration that the foreclosure effect depends on a combination of several factors (e.g. they are calculated on the basis of total turnover and that not being higher than threshold).

D. The effects-based approach treatment of fidelity rebates

In December 2005, the European Commission began to review its enforcement policy regarding the abuse of dominant position generally and the fidelity rebates especially under article 82 EC (present 102 TFEU) and set in public consultation a discussion paper to tryto adopt an approach which is based on the likely effects on the market.[38] This Commission's initiative was anticipated, as over the past few years, almost all Community competition policy had been modernised (Vertical Agreements (Reg. 2790/1999), Regulation implementing Articles 81-82 EC (Reg. 1/2003), Regulation on the control of concentrations between undertakings (the EC Merger Regulation 139/2004)), and only the scope of the abuse of a dominant position was out of the question in terms of modernisation.[39]

In the frame for the abovementioned public consultation, there were a lot of comments on this discussion paper from interested parties many of which the Commission accepted and, in 2009, the European Commission published the Guidance Paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article 82 (present 102 TFEU).[40]

[38] DG Competition Discussion Paper on the Application of Article 82 of the Treaty on exclusionary abuses, December 2005, available on the website: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.
[39] *TriantafyllakisG.*,Free Competition Law, 2nd edition, 2012, 205.
[40] Guidance Paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, available on the website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.045.01.0007.01.ENG.

This is the first time the Commission has published a Communication - "Guide" on its priorities and its approach to the implementation of Article 82 EC (present 102 TFEU). This is a non-binding text which cannot affect the interpretation of Article 102 TFEU by the EU Courts, which retain the possibility of opting for a different approach from the Commission. On the other hand, no one disputes the need for a clear and comprehensive framework within which companies can safely develop their business activity, since the interpretation of Article 102 TFEU up to the Guidance Paper was partial and EU case law does not allow safe conclusions to be drawn. Furthermore, the Guidance Paper focuses mainly on the issue of abusive rebates and abusive under-pricing, basing them on a uniform approach, following a costing approach and on the basis of an equally efficient competitor (with a dominant undertaking).

It is clear that the interpretation of Article 102 proposed by the European Commission concerns the protection of the competition itself. However, it sees this concept not as a competitive process among market participants but as a mechanism by which to optimise resource allocation and maximise consumer welfare.[41] On the basis of the above, it can be stated that the dominant undertaking has a "special responsibility" to maintain effective competition in order to achieve consumer's welfare. That is, the dominant undertaking itself should not jeopardise competition that is efficient and effective, with positive effects for the consumer.[42]

The aforementioned interpretation of the abuse may be legally feasible, since the interpretation of what is lawful should be in accordance with the economic and political conditions. In addition, both economic and practical theory suggest that the presence of few and large players in the market does not place the competition in a weakened position and that some (per se) prohibited practices can be effective for the society as a whole even when they are implemented by undertakings with substantial economic power.[43]

The European Commission introduces two criteria in order for the abuse to be judged; the former concerns the as-efficient competitor and the latter concerns consumer harm. Thus, in order for it to be determined whether the behaviour of a dominant

[41]*Athanasiou L.*, Conceptual delimitation of inhibitory abuse - Thoughts on the European Commission's proposal on the economic interpretation of Article 82 of the EC Treaty, Greek DEE, 2006, 1241.
[42]*Bavasso A.*, The Role of Intent Article 82 EC: From "Flushing the Turkeys" to "Spotting Lionesses in Regent's Park", ECLR 2005, 616, especially 619.
[43]*Neils G & Jenkins H.*, Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down, ECLR 2005, 606.

undertaking has adverse effects, the behaviour of its customers should be examined first. Fidelity rebates can, for example, be reprehensible if it is found that customers often change supplier.[44]

The new Article 102 implementation policy, which the European Commission intends to follow in order to control abusive pricing, is basically based on the Posner's proposal, according to which the examined behaviour can be considered abusive, only if it is appropriate to foreclosure an as efficient or even more efficient competitor. The acceptance of this behaviour as abusive may be overturned, if it is proved that this behaviour is a contributing factor in improving economic efficiency.[45]According to Posner, the main difference is concentrated on the fact that the defendant must prove that the examined behaviour can cause foreclosure from the market on the as-efficient or even more efficient competitor. On the other hand, the Commission in the Guidance Paper introduces cost benchmarks: the average avoidable cost (AAC) and long-run average incremental cost (LRAIC) below which the pricing is considered abusive. Thus, the task of the complainant or the Competition Authority is facilitated.

The Commission's criteria for assessing the pricing behaviour of a dominant undertaking in terms of foreclosure on its as-efficient competitors are clearer and more functional for the consideration of aggressive pricing than for the examination of discount schemes where other numbers should be taken into consideration such as the "relevant range", the "contestable share", the "non-contestable share" and "effective price". Thus, it is unclear what share of the customer's purchasing needs the equally effective competitor could claim in order for him to be excluded or not by the dominant undertaking. Even under these circumstances, the assessment of discount schemes under the current regime seems more predictable.[46]

All in all, the Commission implements a three-step process to assess the competitive effects of those practices that enhance the customer's fidelity towardsthe dominant undertaking. Initially, the Commission will use the as-efficient competitor(AEC) test to determine whether the behaviour of a dominant undertaking is likely to create foreclosure. Once the foreclosure effect has been identified, the Commission will assess whether it is

[44]*Bishop S. & Mardsen Ph*., The Article 82 Discussion Paper: A Missed Opportunity, ECJ 2006, 1.
[45]*Posner*, Antitrust Law, 2nd edition, 2001, 194-195.
[46]*Komninos A. – Lianos I*.,in Tzouganatos D. (Ed.), Free Competition Law, 2013, 678.

likely to cause harm to competition. Finally, if it is found that such behaviour is likely to distort competition, the Commission will establish this by examining the results if there was an objective justification for the behaviour of the dominant undertaking.[47]

E. The Intel Case

The Intel judgment[48](the applicant, Intel Corp., is a US-based company that designs, develops, manufactures, and markets central processing units ('CPUs'), 'chipsets', and other semiconductor components, as well as platform solutions for data processing and communications devices) was seen as a test case for the implementation of the effects-based approach that had been recently adopted and promoted by the European Commission.[49] In Intel, the Commission conducted an AEC test to assess the effect of fidelity rebates granted by a dominant undertaking.[50] The judgment sets out how Intel broke EU competition law by engaging in two types of practices. First, Intel gave wholly or partially hidden rebates to computer manufacturers – Dell, HP, NEC, Lenovo –on condition that they bought all, or almost all, their x86 CPUs from Intel. Intel also made direct payments to Europe's largest PC retailer – Media Saturn Holding (MSH) –on condition that it stocked only computers with Intel x86 CPUs. Second, Intel made direct payments to computer manufacturers – HP, Acer, Lenovo – to stop or delay the launch of specific products containing a competitor's x86 CPUs and to limit the sales channels available to these products. Intel's anticompetitive behaviour diminished competitors' ability to compete on the merits of their x86 CPUs. This resulted in a reduction of consumer choice and in lower incentives to innovate. The Decision also sets out how Intel sought to conceal its practices and how computer manufacturers and Intel itself recognised the growing threat represented by the products of Intel's main competitor, AMD. The Commission stated that Intel's rebates were opposed to EU case law and the AEC test (according to the Commission, the aforementioned test is a way to examine if a rebate scheme can distort competition).

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[47] *Faull & Nikray*, The EU Law of Competition, 3rd Edition, Oxford University Press, 2014, 430.
[48] T-286/09, Intel Corporation Inc. v. European Commission (not yet published / Court Reports – general).
[49] *Miroslava M.*, Should the rejection of the 'as efficient competitor' test in the Intel and Post Danmark II judgments lead to dismissal of the effect-based approach?, ECJ 2016, 387, *Wolter W.*, The judgment of the EC General Court in Intel and the So-called 'More Economic Approach' to Abuse of Dominance, World Competition: Law and Economics Review 2014, 405.
[50] Commission's Decision COMP/C 3/37.990, 13th of May 2009, available on the website: http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf.

While the Commission emphasised that the rebates at issue were, by their very nature, capable of restricting competition, it nevertheless carried out an in-depth examination of the circumstances of the case in its decision, which led it to conclude that an as-efficient competitor would have had to offer prices which would not have been viable and that the Intel rebate scheme could exclude such a competitor. The AEC test, therefore, played an important role in the Commission's assessment of whether the Intel rebate scheme could have anti-competitive effects on as-efficient competitors. Intel lodged a claim which is dependent on the ability of the Commission to demonstrate that Intel's rebates had the effect of foreclosing "as efficient competitors", which is to be questioned given the methodological flaws in its application of the AEC test. Moreover, according to Intel, the Commission does not provide any evidence that, should Intel's rebates go unchecked, they would negatively impact prices and innovation.[51]

Where the undertaking concerned submits evidence that its conduct was not capable of restricting competition and, in particular, of producing anti-competitive effects, the Commission is required to assess such evidence. It has to be determined whether 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. The General Court dismissed the action on 12-6-2014 and following this, Intel lodged an appeal before the Court of Justice asking for the decision of the General Court, according to which a record fine of EUR 1.06 billion was imposed on Intel, to be dismissed. On appeal to the GC, Intel argued, inter alia, that the Commission had made a number of errors in applying the AEC test. The General Court did not examine Intel's arguments, agreeing with the Commission that the rebates were, by their nature, capable of restricting competition without a need for further analysis. The General Court also noted that the Commission had not relied on the AEC test analysis in its decision.

The ECJ stated in its decision[52] that the case must be referred back to the General Court. Moreover, the review by the General Court, in the light of the arguments put forward by Intel, on whether the rebates at issue are capable of restricting competition, involves the examination of factual and economic evidence which it is for that Court to undertake. More specifically, the ECJ judged that, in order for a rebate scheme to be judged by the

[51] *Geradin D.*, The Decision of the Commission of 13 May 2009 in Intel Case: Where is the Foreclosure and Consumer Harm?, 19-10-2009, available on the website: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490114.

[52] C-413/14P, Intel Corporation Inc. v. European Commission, (not yet published / Court Reports – general).

Commission as being abusive in character *"…the Commission is not only required to analyze, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; 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".*[53] In its judgment, the Court of Justice faulted the General Court for not examining Intel's arguments. In light of its clarification of existing case-law, the Court of Justice found that the AEC test applied by the Commission played an important role in its assessment of whether the rebate scheme was capable of having foreclosure effects on as-efficient competitors. Because the General Court had not addressed these arguments, the judgment was set aside and the case was remanded to the General Court.

F. Conclusion

The Court's judgment on the appeal may be an important step towards the abolition of the formalistic approach to per se abusive rebates under the provisions of Article 102 TFEU, giving priority to a more systematic economic analysis and an assessment of the rebates granted on the basis of the extent to which they can have negative effects on competition.[54]At least it is clarified that, in line with the 2009 Guidance Paper, exclusionary abuses should be treated within the framework of a detailed economic analysis so as to evaluate their real impact on competition.[55]It is very likely that this approach also paves the way for evaluating the practices of dominant undertakings, highlighting the effects of these on competition ("effects-based approach") as a key criterion.

Indeed, it should be taken into consideration that the Court of Justice gives the impression that if the Commission had not relied on the evaluation of Intel's practices in the AEC test, the decision would be different, as it highlighted the formal error of the

[53]Ibid., par. 139.
[54] Van Bael & Bellis Law Firm, ABUSE OF DOMINANT POSITION – EUROPEAN UNION LEVEL – Court of Justice issues landmark judgment on legal treatment of fidelity rebates granted by dominant companies and sets aside General Court's judgment in Intel, Newsletter, September 2017, available on the website: https://www.vbb.com/media/Insights_Newsletters/CNL_09_17.pdf.
[55] KLC Law Firm, The Judgment of the EU Court of Justice on Intel's Appeal: The "death" of per se Abuses of Dominance?, Newsletter, September 2017, available on the website: https://www.klclawfirm.com/wp-content/uploads/KLC_CRR_Commentaries_No-5.pdf.

Commission and the General Court and does not refer to a fundamentally incorrect assessment. More specifically, the Court of Justice indicates that *"as regards the relevance of the AEC test … since the Commission carried out that test, the properly assessed results should have been taken into account among all the circumstances relevant to demonstrating the likelihood of restricting competition"*[56]and following this, repeats that *"since the Commission applied that test, the General Court should have examined Intel's line of argument alleging that the application of that test was badly flawed and that, had it been correctly applied, it would have led to the conclusion contrary to that which the Commission reached, namely that the rebates at issue were not capable of restricting competition"*.[57]

The above references are important because it is to be understood that, without the AEC test, the practices of the undertaking in question would be judged per se to be abusive, and that the implementation of the AEC test is not necessary. So, may the new approach concerning the recent Intel judgment is prima facie and the European Commission and EU Courts are not yet ready to go beyond the strict rule of per se abusive fidelity rebates. In addition, the Commission and the EU Courts will have to reconsider their approach and procedures in investigations into breaches of EU competition law. Rebate schemes are dependent on economic factors which influence the market's operation. The current unstable economic and political environment at the EU level leads to new definitions of the rebates scheme.

[56] C-413/14P, Intel Corporation Inc. v. European Commission, par. 119 (not yet published / Court Reports – general).
[57] Ibid., par. 132.