



Loyalty discounts in EU competition law

The General Court's judgment in the Intel case

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Mergers case support and policy

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The Commission decision of 13 May 2009

Intel's dominant position



■ Relevant market

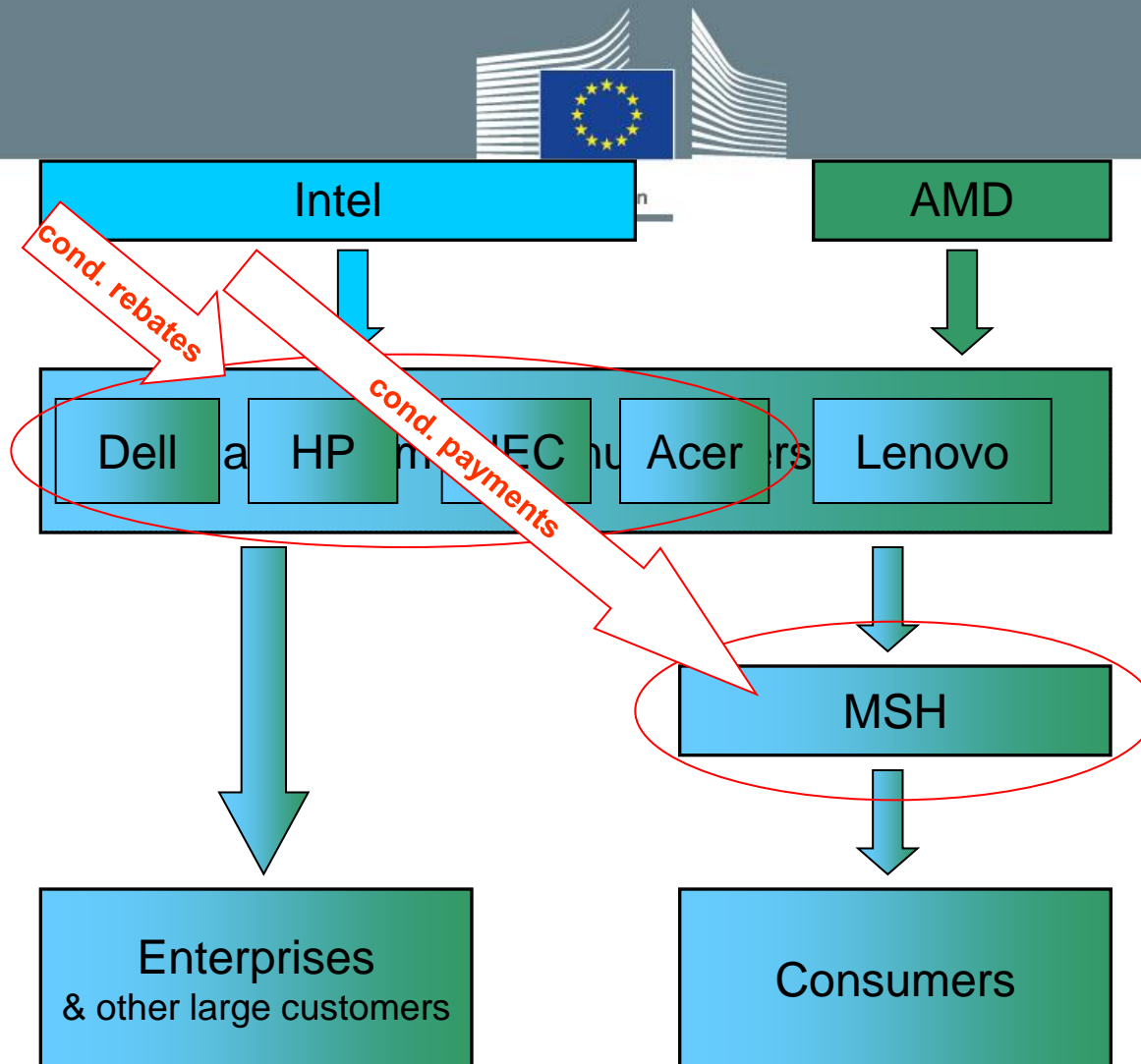
- x86 CPU for desktops, laptops and servers

■ Intel dominant

- ca. 80% market share worldwide
- High barriers to expansion and entry

AMD's growing threat

- AMD improved its products
- Demand from PC makers and retailers for more AMD products
- Intel recognised AMD's growing threat
- Intel targeted key PC makers and MSH to contain AMD
 - Conditional rebates
 - Naked restrictions



Overview

- Rebates and payments to four major OEMs and one PC retailer conditional on (quasi) exclusivity (conditional rebates)
- Specific payments to OEMs to prevent/delay rival products (naked restrictions)
- Cease and desist order
- €1.06 billion fine

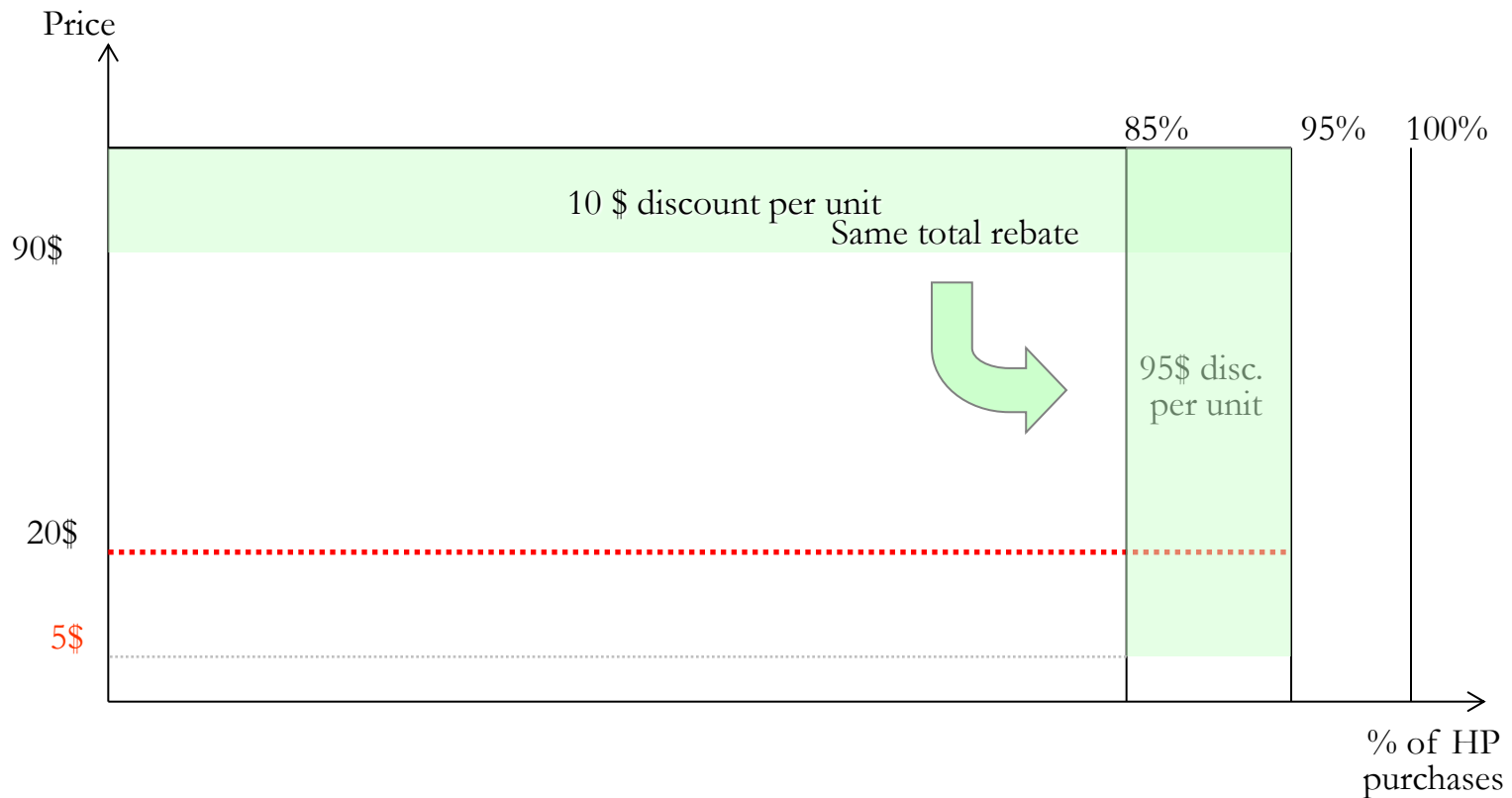
Legal and economic analysis

- Conditional rebates/payments fulfil the conditions of Court of Justice case law (*Hoffmann-La Roche et seq.*)
- Coherent effects-based story (qualitative)
 - Intel targeted key OEMs and MSH to contain AMD
 - Consumers denied a choice of innovative products which they wanted/would have had
- As efficient competitor test (specified not to be legally necessary)
- No objective justification

HP example

- HP wanted to switch towards AMD
- Intel makes rebate payment conditional on 95% requirement
- AMD offers HP 1 million CPUs for free
- HP only takes 160,000 of the free CPUs to stay within the Intel limit
- HP confirms that the reason was the market share limit

As efficient competitor test



Prices and costs in this chart are for illustrative purposes only. They do not represent actual market data.

The General Court's judgment of 12 June 2014

(Case T-286/09)

Rebates: the legal test (1)

■ Three types of rebates

- Pure quantity/volume-based
 - Generally not abusive
- Conditional on (quasi) exclusivity
 - Absent objective justification, inherently abusive: ties customers to dominant firm (*Hoffmann-La Roche* (1979), *Tomra* (2012))
 - No need for individual examination
- Other rebates (e.g. individualised retroactive rebates)
 - May be fidelity-building/abusive
 - Need individual examination and demonstration of potential foreclosure (*Michelin*, *British Airways*)

Rebates: the legal test (2)

- Court distinguishes between:
 - As-efficient competitor (price-cost) tests which are required for predation/margin squeeze/low pricing (*Akzo*, *Telia Sonera*, *Post Danmark*); and
 - the legal test for rebates which are not in themselves considered pricing abuses (*Hoffmann-La Roche*, *Michelin*, *British Airways*, *Tomra* etc.)
 - Source of the "evil" is the conditionality of the arrangement, not the price level

Rebates: the legal test (3)

- As efficient competitor test not legally required
 - Foreclosure occurs not only where access to the market is made impossible for competitors but also where it is made more difficult
 - Court also notes that the Commission's 2009 Guidance Paper on enforcement priorities regarding Article 102 TFEU did not apply
 - Guidance paper post-dates the initiation of proceedings
 - Therefore no infringement of principle of protection of legitimate expectations
- There are in any case other ways of showing potential foreclosure
 - Qualitative, effects-based story

Objective justification/efficiency arguments

- Possibility for a dominant company to justify the use of an exclusivity rebate system, e.g. by showing that:
 - an exclusivity rebate is objectively necessary
 - the potential foreclosure effect is counterbalanced or outweighed by efficiencies that benefit consumers
- There is therefore no *per se* concept of abuse
 - Although this is not new (*Hoffmann-La Roche*, *British Airways*, *Post Danmark*)

Application of test to the decision

- Rebates were conditional on (quasi) exclusivity
 - Very detailed factual examination per OEM of whether there was conditionality - this had been denied by Intel
 - No objective justification → confirmation of abuse
- If a potential foreclosure standard were required:
 - Qualitative analysis per OEM
 - Financial importance of rebates, likelihood of more AMD being chosen, strategic importance of OEMs, overall Intel strategy etc.
 - Potential foreclosure shown → confirmation of abuse

Naked restrictions

- Specific payments by Intel to OEMs to either:
 - Prevent the launch of a PC with an AMD chip
 - Delay the launch of a PC with an AMD chip
 - Restrict the sales channels for PCs with an AMD chip
- Legal test (*Irish Sugar*)
 - Inherently foreclosing/outside the scope of competition on the merits
 - Targeted at one rival: anti-competitive object
 - No need to show potential foreclosure in each case
 - Although the decision also did so

Procedural issues (1)

■ Meeting with Dell executive

- Intel argued that the Commission failed to take a proper record and to therefore disclose to Intel likely exculpatory information

■ Court's general findings

- No duty for meeting to be organised as a formal interview pursuant to Article 19 of Regulation 1
- No general duty to make records of meetings
- But principle of good administration may require it, depending on the context

Procedural issues (2)

■ Court's specific findings

- Need for adequate documentation on the file, to which the company concerned has access, on the essential aspects relating to the subject-matter of an investigation
 - This should at least be a succinct note containing: (1) names of participants; and (2) brief summary of subjects addressed
- Commission infringed principle of good administration by initially not doing so
 - No procedural irregularity: remedied during the proceedings by giving Intel detailed note to the file and opportunity to comment
- Even if finding of procedural irregularity, would not have changed outcome

Procedural issues (3)

- Intel argued that it could not defend itself properly because the Commission had not sought documents from the AMD-Intel civil trial in the US
 - Argued that these documents would be exculpatory (largely because they would show AMD's failings)
 - Argued that it could not obtain the documents itself because of a Protective Order
 - On this basis, Intel did not reply to the second SO
 - As a result of which, it was refused a Hearing which it subsequently asked for

Procedural issues (4)

- No issue that Intel did not have full access to what was on the file - rather that Intel claimed the file should be different/bigger
 - Therefore, Intel's refusal to reply to the second SO and failure to at that time request an Oral Hearing barred it from the right to such a Hearing
- Commission determines how to conduct investigation
 - Must do so impartially, but no general obligation to seek additional documents at request of company being investigated
- May exceptionally be required to seek additional documents
 - Company has not been able to obtain them
 - Documents must be of particular/likely exculpatory importance
 - Request must be proportionate to investigation

Fine

- Single and continuous infringement confirmed
 - Even though the abuses related to different (numbers of) OEMs/companies throughout the fining period
- Findings on concealment of infringement confirmed
 - Which is a factor that can exacerbate gravity
- Findings on intentional or negligent infringement confirmed
 - Not least because of the case-law but also Intel's strategy to foreclose
- Findings on proportionality of fine confirmed
 - Court confirms all the Decision's elements of assessment
 - Also states that the starting percentage of sales (5%) is low and that the fine is well below the 10% ceiling (4.15%)

Conclusion

- The Commission will apply the legal test set by the Court in Intel to exclusivity rebates and exclusive dealing
- The Commission overall remains committed to an effects-based approach also in the area of abuse of dominance
 - Beneficial to consumers and the European economy (prices, innovation, competitiveness ...)
 - Consistency with principles applied to anti-competitive agreements (Article 101 TFEU) and mergers
- For Article 102 cases, an effects-based approach will apply:
 - for rebates other than exclusivity rebates (where the Court in Intel requires the Commission to consider "all circumstances")
 - for other types of abuses where the Courts have endorsed an effects-based approach (margin squeeze, refusal to deal, predatory pricing)
 - for the assessment of efficiency claims
 - for initial priority-setting