



# Conditional rebates under antitrust law: EU courts' Intel rulings confirm effects-based approach

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After 13 years before the EU courts, on 26 January 2022 the General Court (GC) **partially annulled** the European Commission's (EC's) decision finding that Intel abused its dominant position by excluding its main rival from a computer chips market.

Intel's victory is remarkable since the GC annulled the EUR1.06 billion fine in its entirety. The GC followed the legal framework established in the earlier judgment of the European Court of Justice (ECJ) but also gave certain insights into how to assess conditional rebates, in particular the role of economic analysis. We set out the key takeaways.

## The EC's Intel decision

The Intel saga began in 2009 when the EC issued a decision imposing a EUR1.06bn fine (a record at that time) on Intel for abuse of dominance. Allegedly, from 2002 to 2007, Intel had implemented a strategy aimed at excluding its main competitor from the worldwide market for x86 central processing units (CPUs, often referred to as a computer's "brain").

The EC found that Intel's strategy consisted of:

- **Granting conditional rebates to its trading partners.** Intel granted rebates to four original equipment manufacturers (OEMs) which were conditional on the OEMs purchasing all or almost all of their x86 CPUs from Intel. Intel also made direct payments to one retailer on the condition that the computers it sold exclusively contained Intel x86 CPUs.
- **So-called “naked restrictions”.** Intel made payments to three OEMs on the condition that they would postpone or cancel the launch of products with competitors' CPUs and would restrict the distribution of those products.

Significantly, although the EC concluded that the rebates were by their very nature capable of restricting competition, it nevertheless conducted an in-depth effects-based analysis. In particular, it applied the “as-efficient-competitor” test (AEC test) to establish the price at which a competitor as efficient as Intel would have had to offer CPUs to compensate an OEM/retailer for the loss of an Intel rebate/payment.

## The appeals: an ultimate win for Intel

Intel appealed. At first instance, in 2014, the GC upheld the EC's decision in its entirety, concluding that the rebates presumptively infringed competition.

However, in its landmark 2017 judgment, the ECJ set aside the GC's judgment and referred the case back to it. The ECJ concluded that the GC had failed to assess the EC's AEC analysis and Intel's arguments. It clearly directed an effects-based approach to assessing conditional rebates. For more information on the ECJ judgment, please refer to our **client alert**.

In its second take, the GC annulled the part of the EC's decision relating to conditional rebates. While the GC did not reconsider the naked restrictions, given that the EC had assessed Intel's conduct as a whole, the GC could not identify the amount of the fine relating to the naked restrictions and annulled the fine in its entirety.

## The EU courts' assessment of conditional rebates

The GC followed the legal framework established in 2017 by the ECJ. In particular, it set out what it refers to as “three instructive inferences”:

1. Rebates schemes set up by a dominant firm may restrict competition since, given their nature, they may be assumed to have restrictive effects on competition. However, this is a mere presumption and they are not illegal per se. If a dominant firm submits evidence that its conduct is not capable of restricting competition, the EC is obliged to conduct an effects analysis.
2. During the administrative procedure the dominant firm may argue, based on supporting evidence, that its rebates are not capable of foreclosing the market. In such cases the EC should then, as a minimum, assess the foreclosure capability based on five criteria:
  - i) the extent of the dominant firm's position on the market
  - ii) the share of the market covered by the contested practice
  - iii) the conditions and arrangements for granting the rebates in question
  - iv) the duration and amount of the rebates
  - v) the possible existence of a strategy aimed at excluding competitors that are at least as efficient as the dominant company
3. While an AEC test is not obligatory, if the EC carries one out, it must take the test into account in assessing whether the rebate scheme is capable of restricting competition.

## Effects-based approach confirmed

In applying these principles, the GC concluded that the EC made an error of law in finding that the rebates were abusive by their very nature. The EC should have considered the capacity of the rebates to restrict competition.

Following the ECJ's five criteria, the GC found that the EC's effects-based analysis was "incomplete". For example, the EC failed to indicate the share of the market covered by the contested practice. And it did not sufficiently consider the duration of the rebates.

## The AEC analysis must be thorough and robust

The GC also concluded that the AEC tests applied by the EC to each of the OEMs and the retailer were vitiated by errors. For example, in its calculation of the "contestable share" (the share of the customer's demand which the customer would be willing and able to switch to an alternative supplier), the EC relied on only one internal OEM spreadsheet when other contradictory evidence was available.

## Clarifying the burden and standard of proof

The GC made some interesting statements about the burden of proof and standard of proof. These are relevant to all antitrust cases before the EC.

First, the presumption of innocence applies. Second, if the EC finds that the facts establish an antitrust infringement, companies (defendants) may provide an alternative plausible explanation. The EC cannot then be considered to have sufficiently proved the infringement. Third, if the EC provides evidence which, in principle, sufficiently proves the infringement, the defendant needs to demonstrate that the probative value of that evidence is not sufficient.

## Where are we now with conditional rebates?

The GC ruling does not change the approach to assessing conditional rebates. But it is important in applying the ECJ's effects-based approach and finding that the EC fell short. For dominant firms setting up and running rebate schemes, it is a lesson to collect and retain evidence in support of a lack of foreclosure capability. If the dominant company provides such evidence during any subsequent administrative proceedings, the EC will have to conduct a thorough and exhaustive economic analysis.

Indeed, the judgment confirms that economic analysis plays a vital role in assessing the capacity of conditional rebates to restrict competition. This is relevant to all interested parties - the EC, dominant firms and their competitors.

The GC judgment puts a heavy burden on the EC to carry out the analysis in a diligent and robust manner, taking into account all relevant evidence. And it will be interesting to see whether the harsh lesson from this case, and in particular its loss on the AEC test, will discourage the EC from applying AEC tests in future cases.

## What will the EC do next?

The next move will be a huge dilemma for the EC. Options include an appeal of the GC judgment to the ECJ, which risks another unfavourable ruling, and the re-adoption of its decision, with errors corrected. Resourcing will surely come into play, particularly in relation to the latter option.

Beyond the Intel case, the GC judgment is relevant to two pending appeals, which also concern rebates and exclusivity payments: the Qualcomm and Google Android cases.

Overall, the case confirms that the EC faces a much tougher task in future enforcement action against allegedly anti-competitive conditional rebates and it secures an important victory for Intel and other dominant firms.

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