

The Court of Justice issues a landmark judgment on the legal treatment of fidelity rebates and sets aside the General Court's *Intel* judgment

On 6 September 2017, the Court of Justice of the European Union (CJEU) issued its long-awaited judgment in the *Intel* case, setting aside the General Court's judgment. The General Court must now reassess the legality of the Commission's decision in light of the CJEU's ruling. Intel was supported by the Association for Competitive Technology (ACT) represented by Van Bael & Bellis partners Jean-François Bellis and Tim Kasten.

With respect to fidelity rebates, the CJEU concluded that existing case-law (in particular, *Hoffmann-La Roche*) needed clarification, and that, where an undertaking submits evidence during the administrative procedure that its conduct is not capable of restricting competition, the Commission is required to consider the extent of the dominant position, the share of the market covered by the practice, the conditions and arrangements for granting the rebates (including duration and amount) and the possible existence of a strategy aimed at excluding competitors. Thus, the CJEU clarified that loyalty rebates are not "*per se*" infringements, as they appeared to be under the General Court's Judgment. Instead, loyalty rebates (and other exclusivity obligations) are subject to a rebuttable presumption, and require further analysis when the dominant undertaking submits evidence that its conduct is not capable of foreclosing as-efficient competitors. This puts an end to an anomaly in EU competition law in which rebates conditional on exclusivity, that is, mere incentives to achieve exclusivity, were treated more harshly than outright exclusivity obligations (for which market coverage, among other things, had been considered a relevant factor in assessing an infringement of Article 102 TFEU).

Intel had argued that its rebates were not capable of restricting competition during the Commission investigation, but the Commission rejected these arguments as irrelevant after concluding that the rebates were by their nature capable of restricting competition. Nonetheless, for the sake of completeness, the Commission also examined the circumstances of Intel's rebates, and carried out an AEC test ("as efficient competitor" test) to determine the capability of the rebates to foreclose as-efficient competitors, and concluded that Intel failed this test. However, the Commission stated that the AEC test did not form part of the decision and was not relied upon to find that the Intel rebates were abusive.

On appeal to the General Court, 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 need for further analysis. The General Court also noted that the Commission had not relied on the AEC test analysis in its decision.

In its judgment, the CJEU faulted the General Court for not examining Intel's arguments. In light of its clarification to existing case-law, the CJEU found that the AEC test applied by the Commission played an important role in the Commission's 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.

The judgment effectively eliminates the distinction that the General Court had drawn between fidelity rebates within the meaning of *Hoffmann-La Roche* ("category two rebates") and conditional rebates that may also have a fidelity-building effect ("category three rebates"). The General Court had considered that it was only in the case of rebates falling within the third category that it was necessary to assess all the circumstances surrounding the rebate. The CJEU ruling now makes it clear that this additional analysis is also required for category two rebates, at least where the dominant undertaking submits evidence that its conduct is not capable of restricting competition and producing the alleged foreclosure effects. More generally, the judgment requires the Commission and the General Court to conduct a more thorough analysis of the capability of any rebate scheme to have exclusionary effects, and consider all the evidence put forward in this respect (including the results of any as-efficient competitor test that has been applied).

Chaussée de La Hulpe 166
Terhulpesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50

Fax: +32 (0)2 640 64 99

vbb@vbb.com

www.vbb.com