

**Baker  
McKenzie.**

**Intel**

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Reactions from DG COMP and the  
BKartA

# Reactions from DG COMP and the BKartA

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- M. Vestager, Head of DG COMP, 18 September 2017:
  - *“Our working methods and line of thinking has developed since the Intel decision back in 2009. [...] We will keep working our cases. It’s important to recognize that most cases will be looked at from both sides. From the side of what’s the effect, and what’s the object of the behaviour”.*
- A. Mundt, Head of the BKartA, 8 September 2017:
  - *“This week’s decision [...] has vindicated the economic approach developed by the European Commission ahead of the landmark decision [...]. The ECJ’s decision to refer the case back to the EU’s lower court is in line with the Commission’s 2009 Guidance Paper on its enforcement priorities, in cases involving dominant companies and exclusionary conduct.”*
  - *“The Commission’s economic reasoning was in line with the ECJ’s demand that the lower court carries out a more rigorous examination of the competition implications of the rebates. [...].*

## **Contrast: AG Kokott, Post Danmark II:**

*“[...] the Court should not allow itself to be influenced so much by current thinking (‘Zeitgeist’) or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.” (§4)*



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Frequently asked and  
occasionally answered questions



Yes!

## AEC for non-price abuses?

- *Post Denmark II* (Case C-23/14) overruled: Not necessary to apply the AEC test to show that a (non-exclusive) rebate scheme is anti-competitive. It is “one tool among others”. (§60)
- *Pre – Intel*: AEC and Priorities Guidance (2009/C 45/02) already applied in non-infringement decisions:
  - *Tomra* (Case C-549/10 P, 2012) (arguably)
  - *Velux* (European Commission, COMP/39.451, 2009);
  - *Pharma case closure* (CMA, Case CE/9855, 2015);
  - *Impulse Ice-cream case closure* (CMA, 2017).



Yes!

## De minimis revived?

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- *Intel*: The scope of the alleged illegal practice's market coverage is central in the foreclosure analysis. (§139)
- *Post Danmark II* overruled: “It follows that fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates” (§73).
- Relevant precedents Hoffman La Roche (Case 85/76, §123) and Tomra (Case C-549/10 P, §42) implicitly overruled.
- *Pre-Intel*: CMA already applied the *de minimis*:
  - *IDEXX Laboratories case closure* (CMA, CE/9322/10, 2011);
  - *Streetmap vs. Google* (English High Court, EWHC 253, Ch, 2016);
  - *Impulse Ice-cream case closure* (CMA, 2017).
- Open questions:
  - What is the safe harbour (% market coverage and/or length of time)?
  - What about “strategic customers”/exclusion plans?

Yes!

# Priorities Guidance reprimed?

- Result of *Intel*: Rebates are aligned with Priorities Guidance
- Priorities Guidance (§20) **one step** approach:
  - burden on authority to demonstrate foreclosure based on market power, duration, coverage and AEC (§20)
- Intel (§ 141) **two step approach**:
  - authority shows *prima facie* anticompetitive (eg. rebate for exclusivity or stretch target)
  - defendant puts forward non-foreclosure defence
  - authority must assess foreclosure.
- In practice, there will be few cases in which defendants do not raise the “**non-foreclosure**” defence.
  - Conceivably, the “non-foreclosure” defence might be impossible to raise in very aggressive rebate schemes.

# Does *Intel* also apply to contractual exclusivity?

Arguably

“[T]he Court has already held that an undertaking which is in a dominant position on a market and ties purchasers ... **whether the obligation is stipulated without further qualification** or whether it is undertaken in consideration of the grant of a rebate” (§137)

“[T]hat 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.” (§138)

BUT: “[T]he Commission is not only required to analyse, 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 ”

- No AEC test would be applied in contractual exclusivity;
- However, one could look at market coverage and other foreclosure evidence.





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Difficult questions unaddressed

# Contestable share?

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- Actual data available?
  - Customer threatened switch amounts (BUT Intel customers and Intel had different views on switchable CPU volumes)
  - Salesman view of customer orders with/without scheme
- Rules of thumb:
  - Second largest competitor
  - Divide non-DomCo market share by 3
  - Plausible order size – minimum plausible volume
- If uncertain apply low contestable share (e.g. 5%) for conservative outcome

# Multiproduct rebate schemes?

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- Where multiple products (including dominant products) are subject to volume target what test should be applied:
  - *Hoffmann-La Roche*: seven vitamin groups subject to target rebate scheme. Considered illegal tying.
  - *Coca-Cola Undertaking*: Commission requires unbundling of products under the target rebate scheme
  - *Post Danmark II*: target operated across both small and large postal items (some of which were under statutory monopoly)
- Multiple product rebate schemes will require much greater caution in calculation of contestable share, since DomCo's range of products (and so assured base) will be higher than rivals selling one or two products in portfolio.

# Multitier rebate schemes (1)?

## DomCo's "go for growth" scheme

Annual Volume Achievement (€)	Rebate (on all units)	Rebate Value € (max)
50,000	0%	0
60,000	1%	600
70,000	2%	1,400
80,000	3%	2,400
90,000	4%	3,600
100,000	5%	5,000



# Multitier rebate schemes (2)

## Assumptions:

- Margins: 40%
- Customer requirements: €100,000
- Contestable share: 10%

	Customer buys 100% from DomCo	Customer buys 90% from DomCo/10% from TiniCo	
Value (€)	100,000	90,000	10,000
Rebate	5% = 5,000	4% = 3,600	14% = 1,400
Total	<b>95,000</b>	86,400	8,600

To make it worthwhile for customer to start buying from MiniCo, it must offer a price of €8,600  
= 14% discount = TiniCo positive margin

**Conclusion: AEC test passed, foreclosure unlikely**

# Multitier Rebate Schemes (3)

## Quick tip

TIP: 14% is also the % discount differential between each tier (1%) divided by the contestable share ( $1/10 = 10$ ) plus the second to last % rebate (4%)

Annual Volume Achievement (€)	Rebate (on all units)	Rebate Value € (max)
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100,000	5%	5,000

# Excel: The Rebate Adviser's New Best Friend

A. Input Rebate Scheme			
	Lower bound	Upper bound	Rebate %
Rebate (%) for sales between:	0.00	5 000.00	0.0%
Rebate (%) for sales between:	5 000.01	10 000.00	6.0%
Rebate (%) for sales between:	10 000.01	15 000.00	8.0%
Rebate (%) for sales between:	15 000.01		12.0%

  

B. Input Data	
B1. Please enter the market share for the product (%).	60%
B2. Please enter the contestable share for the product (%).	15%
B3. Current Sales on the market (units)	200
B4. Please enter the price per unit before rebate (currency).	100
B5. Please enter the long-run average incremental cost (LRAIC) per unit for the contestable share (currency).	75

  

C. Results	
C1. Is the company dominant?	Yes
C2. If so, what is the contestable share?	15%
C3. What are the total customer sales for the product (currency).	20 000.00
C4. Would switching the contestable share cause the customer to change rebate tier?	No
C5. Current rebate percentage:	12%
C6. Total sales associated with contestable share	3 000.00
C7. Rebate percentage if contestable share is switched:	12%
C8. Rebate reduction	0%

  

Ca. Margin Analysis	
Ca.1 Contestable share margin	25.0%
Ca.2 Effective rebate	12.0%
<b>Ca.3 Evaluation</b>	<b>LEGAL</b>

  

Cb. Price/Cost Analysis	
Cb.1 Price per unit after rebate	88.00
Cb.2 Costs per unit	75.00
Cb.3 Profit per unit	13.00
<b>Cb.4 Evaluation</b>	<b>LEGAL</b>

- Market share data
- Rebate % and boundaries
- Estimate of margins
- Contestable share proxy

# Has Intel won? Has the Commission lost?

Wait and see

> Saga far from over... GC may uphold the Commission's decision after examining the Commission's AEC/in-depth analysis

> Guidance on AEC test conducted by the Commission awaited

> Guidance on *de minimis* also eagerly awaited

> The Commission's job is now more difficult; some (CET) happy; some (legal services) not so happy

> Since most rebates schemes will be captured by Art. 102 → NCAs and National Courts will follow

> Commission's Enforcement Guidance endorsed (even outside the rebates area?)





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