A practical approach to rebates

by Bill Batchelor and Sophia Real, Baker McKenzie

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An article addressing practical counselling issues in relation to the EU competition law analysis of rebate schemes under Article 102 of the TFEU after the ECJ's judgment in *Intel* (*Case C-413/14 P*) on 6 September 2017.

Rebates rules revised: an effects-based approach

In its *Intel* ruling (*Case C-413/14 P*), the European Court of Justice (the ECJ) revised its previous jurisprudence on when a dominant company's rebate scheme may be abusive. While this is not a final decision for Intel, the case marks a major departure from prior case law.

Before *Intel*, advising on rebates involved walking a tightrope between the Article 102 Priorities Guidance (*Guidance on the Commission's enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings OJ 2009 C45/7*) and the EU Courts' case law in *Tomra* (*Case C-549/10 P*) and *Post Danmark II* (*Case C-23/14*) General Court in *Intel* (*Case T-286/09*). The former applies an economics-based test. The latter a form-based test, condemning certain categories of rebate without economic evaluation. But many rebate schemes fell between the gaps of these ill-defined categories. And unthinking application of form-based rules risked penalising economically benign practices.

Intel finally resolves this debate, favouring an economics-based analysis. Companies therefore have greater scope for crafting compliant rebate schemes. They can take comfort that properly devised schemes can be defended if they show no potential for exclusion.

This article considers the practical implications for practitioners advising on rebate schemes based on *Intel* and non-infringement cases at EU (*Velux, COMP/39.451*) and national competition authority (NCA) level (UK Competition and Market Authority's (CMA) *Pharmaceutical case closure statement (Case CE/9855)* and *Impulse Ice-cream case closure statement*).

The Intel "clarification" that changed everything...

Pre-*Intel*, case law defined three categories of rebates. This position - albeit culled from older case law - was summarised by the General Court in *Intel* and largely endorsed by the ECJ in *Post-Danmark II*:

- Pure quantity/volume based rebates, linked to the volume of purchase and granted in respect of each individual order (as opposed to aggregated across multiple orders) are presumptively legal.
- Exclusivity rebates, were considered as per se abusive. Exclusivity rebates require customers to obtain all or most of their requirements from the dominant supplier.
- "Third category" rebates, which involve neither pure quantity nor exclusivity linked volume rebates. For "third category" rebates the assessment was a nuanced one, involving an assessment of "all the relevant circumstances".

The ECJ in *Intel* sweeps aside these categories. It notes that "not every exclusionary effect is necessarily detrimental to competition" (*paragraph 134*). With marked understatement, it conceded past cases may have condemned rebates *per se* when rewarding exclusivity or loyalty (*paragraph 137*), but stated this case law "must be further clarified". If the defendant puts forward reasons why its scheme is not capable of having exclusionary effects, then a full market analysis is required (*paragraphs 138 - 140*). That assessment must include:

- The extent of the undertaking's dominant position on the relevant market.
- The share of the market covered by the challenged practice.
- The conditions and arrangements for granting the rebates in question, their duration and their amount.
- The possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (*paragraph 139*).

The *Intel* formulation thus foresees a two-step analysis. The authority may conclude a scheme is facially abusive. For example, it may reward exclusivity or stretch targets. But if the defendant puts forward a defence of no capability of foreclosure, supported by evidence, then the authority must examine whether foreclosure arises. As a practical matter defendants - in all but the most clear cut of cases - will put forward such a defence. The ECJ's "clarification" therefore shifts the case law from one of form-based assessment, to one of economic analysis.

Commission officials, post-*Intel*, have stated they do not believe *Intel* will change their assessment approach in practice, since in some cases they have already examined "as efficient" competitor type tests for foreclosure. They do, however, add the caveat that they consider *Intel* effectively changes the burden of proof, and they would expect the dominant firm to present "case-specific arguments based on concrete evidence" of no capability to foreclose that are "sufficiently serious and substantiated". The Commission would then evaluate this submission. By implication, therefore, absent evidence of non-exclusion from the defendant, the Commission may regard a facially abusive rebate scheme as proven to infringe Article 102 (see *Speech by Johannes Laitenberger on the relationship between accuracy and administrability in competition enforcement*).

Intel: Background

Intel is an allegedly dominant supplier of central processing unit (CPU) chips for computers and servers.

According to the Commission's 2009 decision, Intel agreed with its main desktop customers that it would pay them substantial rebates in return for exclusivity or near exclusivity, amounting to between 80% and 100% of their needs. The rebate in some cases totalled hundreds of millions of dollars. Intel also paid additional amounts to these customers and to a PC retailer to (i) not stock competitor-chip-based PCs, (ii) delay the introduction of rival chips, and (iii) confine the competitor chips to non-strategic products.

The Commission adopted a twin track analysis of the rebates. It conducted a detailed economic analysis of the scheme finding that it was likely to exclude an "as efficient" competitor, applying the Priorities Guidance principles. It also found the conduct would be illegal under the old EU Court's case law that held exclusivity or loyalty rebates illegal (without any detailed economic analysis). It imposed a fine of EUR1.06 billion.

Intel appealed, arguing *inter alia* that the Commission had applied a flawed economic analysis of whether the rebates scheme would exclude rivals.

At first instance, the General Court dismissed the appeal. The Commission did not have to conduct any economic analysis to demonstrate illegality, it held. It was sufficient to identify that rebates based on exclusivity or a very high percentage of needs were likely to be anti-competitive.

On appeal, the ECJ reversed, holding that if a defendant puts forward economic analysis showing non-foreclosure, it was incumbent upon the Commission, and in this case the General Court, to examine whether that analysis was correct. The ECJ remitted the case to the General Court to conduct this analysis .

The Priorities Guidance

The *Intel* standard, in particular the fourth criterion, requires an analysis of whether a scheme may exclude an "as efficient competitor" (AEC). The ECJ's logic is that competition law should not protect inefficient companies, with, say, an inflated cost base, obsolete manufacturing or bad management. It is only if conduct excludes a company just as efficient as the dominant company that competition law should intervene (*paragraphs 133-134*):

> "[I]t is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market" (*paragraph 133*).

The Priorities Guidance articulates how this analysis may be conducted. It sets out a test that assesses - in substance - whether a small rival could match the same value of rebate (that is to say, one equally attractive to the customer) over its smaller volume of sales, and still sell profitably to that customer. The relevant measure of cost is not the rival's cost base, but the dominant supplier's. The question is whether the dominant supplier's rebate scheme excludes an "as efficient" competitor (*paragraph 25*).

The Priorities Guidance provides a four-step test for assessing this question:

- **STEP 1:** Assess the contestable share. "How much of a customer's purchase requirements can realistically be switched to a rival" (*paragraph 42*)?
- **STEP 2:** Calculate the effective price, spread over the contestable share, which must be offered by a competitor to match the value of the dominant company's rebate.

  For example, a rival can realistically sell 20% of a customer's requirements for 100 units. The customer risks losing a 5% rebate from the dominant company over all 100 units. The effective price the rival must offer to compensate the customer for this loss is a 25% discount. Spreading the price of the five units (representing a 5% rebate lost from the dominant company) over the 20 units the rival will sell, represents an average discount of 25%. In other words, divide the lost dominant supplier rebate (5%) by the contestable share (20%) to get the effective price (5/20 = 25% discount).
- **STEP 3:** Identify the relevant costs (*see Relevant costs, below*).
- **STEP 4:** Identify whether the effective price is below cost.

If the outcome of this test suggests that the effective price is lower than the costs identified in step 3, then potentially illegal foreclosure may arise.

Similarly, the additional criteria in the Priorities Guidance, echoing *Intel*, requires an assessment of the degree of market power of the dominant company, barriers to entry or economies of scale, the position of competitors and market coverage of the practice (*paragraph 20*).

Relevant costs

The cost benchmarks that the European Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC).

AAC is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct.

LRAIC is the average of all the (variable and fixed) costs that a company incurs to produce a particular product.

AAC is specific to each unit (such as raw materials, energy and packaging), while LRAIC is specific to each line of production (the AAC of each unit plus the other costs, such as labour, production equipment, storage and distribution infrastructure, directly involved in producing the relevant product).

Generally speaking, the scheme will be legal if effective price is above LRAIC, while the scheme will be illegal if the effective price is below AAC. Between LRAIC and AAC a fact-specific assessment is necessary.

Distilling advice from recent non-infringement decisions

Non-infringement decisions are rare in rebates cases. But they are very valuable for counselling practice. They present practical examples of the right approach, which is more helpful than non-fact specific guidance or cases based on extreme facts like *Intel* or *Post Danmark II*.

Velux

Velux, a Danish roof window manufacturer, offered conditional incremental rebates, varying from country to country for a period of six months. The maximum rebate was 5%, applied in small increments of 0.2% to 0.5%. The scheme was "incremental" in the sense that customers earned rebate only on units purchased above a particular threshold. It did not "roll back" retroactively to the first unit purchased. The Commission found the highest rebate would still be likely to allow Velux to cover its incremental costs.

The Velux rebate scheme was based on incremental rebates. But two DG COMP officials, writing in a personal capacity, take the analysis a step further in a highly instructive Competition Policy Newsletter (*see "The Velux case – an in-depth look at rebates and more", Svend Albaek and Adina Claici and box: The Velux maths explained, below*). In the newsletter, they hypothesise what the outcome might have been had the rebate been retroactive. They take the minimum likely order size from a builders' merchant as a conservative proxy for contestable share. They then calculate the "effective price" a Velux rival would have to offer to compensate the customer for switching this contestable share. In conclusion, they determined that the effective price would be approximately 10% less than list price, and hypothesise that this is likely to be a discount a Velux rival is able to afford without going below the relevant measure of cost.

The Velux maths explained

The officials hypothesise that each tranche in the scheme represented 100 units, with each unit costing EUR100. They further assume that Velux is such a strong brand that builders' merchants will source at least 90% of demand from Velux, even in the absence of any rebate. For an average builders' merchant buying, say, 1,000 units, it would source 10% of that volume (or 100 units) from competing suppliers.

This seems inherently plausible. Dealing in volumes of 100 units is likely to be achievable for both merchant and a rival window supplier. These 100 units, therefore, represent the "contestable share" of the merchant's requirements.

Due to the stepped nature of the rebate scheme, the merchant could source 10% from a competitor and still receive the full 4.5% retroactive discount on units 1-900 from Velux. Nevertheless, he would lose the 5% discount for units 901-1,000 (100 units @ EUR100 per unit multiplied by 5% is EUR500) and the additional 0.5% discount for units 1-900 (900 units at EUR100 per unit multiplied by 0.5% is EUR450) that he would have received had he reached the final tranche, meaning a total loss of EUR950. The rival would have to compensate for this loss by offering a discount with an aggregate value of EUR950 on the value of the 100 units (EUR10,000 at list price of EUR100 per piece). EUR10,000 less EUR950 is a 9.5% discount. In other words, the effective rebate applied to the 100 unit "contestable share" is 9.5%. The "effective price" is therefore - at maximum - EUR90.5.

If Velux's margins (that is list price less relevant measure of cost) can accommodate a discount of 9.5% then this programme would not foreclose an as efficient competitor.

Velux has useful counselling points. First, incremental programmes (paying the rebate only on units purchased after achieving the target, but not "retroactively" on all units) present fewer compliance concerns. The only question is whether the post-threshold units are priced below the appropriate cost measure. If above cost, then the scheme is likely to be legal. So when counselling on rebate schemes, an easy way to defuse a possible problematic "retroactive" scheme is to convert it to an incremental one.

Second, even if rebates are paid retroactively, the compliance risk can be mitigated if the difference between the level of rebate offered at each tier is a very low (say, increments of 0.5%). The aggressiveness of the scheme is defused over multiple steps. The customer does not risk losing the entire rebate, but only the rebate applicable to the next available tranche.

Third, it may be possible to find an easy rule of thumb for size of contestable share by considering the likely minimum order for the products.

Where the rebate increments are low and unlikely to go below cost over the relevant contestable share (or a conservative proxy for such a share) then the scheme is unlikely to foreclose. By contrast, one-shot retroactive rebate schemes quickly become unmatchable for smaller rivals. Even quite a modest percentage rebate - say 5% - quickly becomes foreclosing over a small contestable share. For example, if the rebate is 5% and only 5% share of the market is contestable, the dominant supplier's effective price over the contestable share (5%/5% = 100% discount) is so high that a rival must offer the product for free to contest the rebate. See further *box: The Intel rebate scheme allegedly required AMD to pay customers to take products*

The Commission's Velux investigation was closed in 2009 without penalty.

The Intel rebate scheme allegedly required AMD to pay customers to take products
The New York Attorney General in *Intel* alleged that the rebates offered by Intel had such a significant impact on its customer HP that Intel's rival, AMD, had to pay HP to take AMD products in place of Intel's:

> "AMD will establish a fund of $25M per quarter for the first three quarters of the agreement which HP can draw from as compensation for potential retaliatory acts from Intel. Such acts may include ... the unusual loss of discounts or other market development funds from Intel as a result of execution of this agreement" (*Intel Complaint, paragraph. 159*).

CMA pharmaceutical sector case closure statement
In 2015, the CMA closed an investigation into a pharmaceutical company's rebate scheme on administrative priority grounds, finding that the scheme had a limited impact on consumer welfare.

The CMA stated that:

> "In order to provide general guidance to businesses and their advisers, the CMA describes below some of the circumstances in which the provision of rebates or discounts by a dominant company may raise competition concerns."

Incremental rebates, the CMA stated, are unlikely to cause concern. The CMA offers a relatively narrow view of what a lawful incremental rebate comprises, being rebates that pass on cost savings to the customer from incremental volumes above a given threshold.

Retroactive rebates, by contrast, leverages the dominant supplier's "assured base" into contestable demand. If the effective price a smaller rival must offer over the contestable share is below the dominant company's relevant measure of cost, then there was a risk of illegal foreclosure.

Conversely "as long as the effective price remains consistently above the long run average incremental cost (LRAIC) of the dominant company, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate or discount. In such circumstances the CMA is likely to consider that the rebate or discount is normally not capable of foreclosing in an anti-competitive way." Where the effective price is between LRAIC and AAC, the CMA would consider whether other factors suggest illegal foreclosure.

The CMA's statement - for all that it is not law - is a useful explanation of the analytical framework it may apply when assessing rebate schemes depending on the specific circumstances of the case, and one which is consistent with the European Commission Priorities Guidance.

Impulse Ice cream case closure statement

On 10 August 2017, the CMA closed an investigation into a suspected abuse of dominant position by Unilever in the supply of single-wrapped impulse ice cream in the UK, on the basis that there were no grounds for action.

The focus of the investigation related to promotional deals offered by Unilever, under which it supplied to retailers impulse ice cream products free of charge or at a reduced price if they purchased a minimum number of single-wrapped impulse ice cream products from Unilever. For example, "buy 2 cases get 1 case free".

At the opening of the investigation, the CMA stated that it had reasonable grounds to suspect that Unilever's (that was supposed to enjoy a dominant position in the relevant market) promotional deals were likely to produce an exclusionary effect, by providing incentives to retailers to purchase a large proportion of their total requirements from Unilever with the likely effect of (nearly) filling retailers' freezers, and so of restricting competition in the supply of single-wrapped impulse ice cream products (*paragraph 4*).

The CMA continued that such exclusionary incentives would be more likely to arise to the extent that (*paragraph 4*):

- Unilever had an assured base of sales because of the strength of its branded products regarded by retailers as particularly important to stock (referred to as "must-have" or "non-contestable products") in its ice cream portfolio and its reservation of capacity in the freezers it supplies.
- Unilever's promotional deals included both Unilever's non-contestable and contestable products, and the rebates on Unilever's promotional deals effectively applied without distinction to retailers' purchases of both non-contestable products and contestable products.
- Retailers' freezer capacity for single-wrapped impulse ice cream was constrained.
- The promotional deals were made available to retailers during periods in which significant volumes of sales were made.

The CMA applied an effects-based approach concluding there was no reason to investigate the case. It held that exclusionary effects were unlikely to result from the large package offers. The structure and the availability of Unilever's promotional (i.e. the promotional offer was given in February or March, where ice cream consumption is typically low, and were available for just one month), taken together with the purchasing patterns of retailers (i.e. purchasing decisions made during winter and early spring were unlikely to affect purchasing decisions during the summer months), were such that Unilever's promotional deals were unlikely to have an exclusionary effect (*paragraphs 26-27*).

Practical problems in rebates counselling

Though conceptually clear, the Priorities Guidance offers little by way of practical assistance to apply its rebates methodology. A number of questions commonly arise in practice.

Is there a safe proxy for contestable share?

The concept of "contestable share" - those units that a customer might switch to a smaller rival - can be hard to translate. What a plausible contestable share is will depend on the industry. For commodities, capacity constraints may be the only limitation on switching to a rival. The smaller rival may simply not have the capacity to produce enough for major customers. For consumer products, the marketing buzz around the leading brand may make that brand unavoidable. Retailers know consumers will expect to buy predominantly "brand X", so there will be limited shelf space to spare for brands "Y" and "Z". For intermediate products, the end product specification may require "brand A". So brands "B" and "C" may only have a chance of being purchased for new production runs, or new products, where the specification has yet to be settled.

But even after taking account of these considerations, the "contestable share" may be unclear. How to ascertain an unknowable - what a customer might buy from a rival "but for" the rebate - remains difficult. And since a small change in contestable share delivers very different results, it is important to use a suitably conservative threshold.

Sometimes actual data may be available. If the business has to justify the size of the rebate, the justification may include the volume of sales likely to be achieved with, and without, the rebate. The difference between the two figures must represent "contestable" units.

Absent actual data, proxies for contestable share must be used. The approach in *Velux* - a minimum plausible order size - is a good example.

Other proxies tend to be market share-based. After all, if the dominant company has, say, a 60% market share it is clear that - on average - 40% of demand has been contested by rivals. But assuming that the entire share would switch to a single rival is probably unrealistic (would each rival be able to serve the entire contestable amount?).

So, one approach is to take the second or third largest rival's share (as the largest competitor's share may be unrepresentative). If competitor shares are not available, another approach can be to divide the non-dominant market share by three. If the dominant supplier has, say, 60% share, then the remaining share (40%) divided by three (13.3%) may give a fair proxy for contestable share. Ultimately, if there is no clear proxy based on the data, using a very small percentage contestable share (say 5% of a customer's demand) allows the scheme to be tested based on a very low threshold.

In each case, erring on the side of caution enables the rebate scheme to be more easily defended. So choosing a safe proxy, one that has been road tested with the business and compared against actual data, where available, is essential.

Tetra-Pak in China

The methodology used by the EU Priorities Guidance has also been influential in shaping the approach of other authorities. On 16 November 2016, China's State Administration for Industry and Commerce (SAIC) imposed a penalty on Tetra-Pak for alleged abuse of dominance, including anti-competitive loyalty discounts. In its decision, the SAIC applied a test similar test to the Priorities Guidance.

The SAIC assessed the contestable share, finding that competitors could compete only for this portion of demand. Tetra Pak's loyalty rebate meant competitors could not offer an effective price to compete for the contestable share.

Does Intel re-introduce de minimis?

A further question is whether a dominant company can argue that, although facially exclusionary, its rebate programme affected only a very small proportion of demand, and so had a de minimis effect. Prior to *Intel*, the ECJ in *Post Danmark II* denied any de minimis defence in rebates cases:

> “[F]ixing 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" (*paragraphs 72-74*).

Though not referring to *Post Danmark II*, the better view must be that *Intel* has now overruled this dictum. Intel requires foreclosure analysis assess the rebate scheme's market coverage. Implicitly, therefore de minimis market impact weighs against a finding of abuse.

Cases before national authorities and courts show a readiness, even before *Intel*, to apply a de minimis criterion. In *Impulse Ice Cream*, the CMA found:

> "[A] review of data provided by wholesalers relating to the take-up by retailers of Unilever’s Package Offers shows that sales through Unilever's Package Offers did not represent a very large proportion of Unilever's total sales. In particular, there appears to have been relatively limited take-up of the larger 12 or 18 case Package Offers in each calendar year in which they were made available during the Relevant Period. Over the season as a whole, take-up of the larger Package Offers was limited, accounting for [0-10]% of Unilever’s sales in 2016” (*paragraph 31*)

Similarly, in In *Streetmap v Google,* the English High Court distinguished *Post Danmark II* to find de minimis applicable (*EWHC 253, Ch*). Streetmap claimed that Google abused its dominant position in online mapping services by bundling search results with maps. Mr Justice Roth took into account the fact that Google's behaviour had no appreciable effect in the market for online maps. He reasoned that Post Danmark II was applicable only where the allegedly abusive effects arise on the same market. Where the effect of the abuse is allegedly leveraged to a related, but non-dominant, market, the effect must be appreciable:

> "I do not regard the pronouncements of the ECJ [...] as precluding me from holding that where the likely effect relied on is on a non-dominated market, a de minimis threshold applies and that to constitute an abuse the effect must therefore be appreciable. [...] It is axiomatic, as I remarked earlier, that competition by a dominant company is to be encouraged. Where – as here – its conduct is pro-competitive on the market where it is dominant, it would to my mind be perverse to find that it contravenes competition law because it may have a non-appreciable effect on a related market where competition is not otherwise weakened. Accordingly, I consider that in the circumstances of the present case a de minimis threshold applies. For Google's conduct at issue to constitute an abuse, it must be reasonably likely to have a serious or appreciable effect in the market for online maps" (*paragraphs 96-98*).

Accordingly, if a scheme affects one of hundreds of customers, then the likelihood of foreclosure is low. However, this analysis should not just be numeric, but also qualitative. A scheme that cherry picks the most attractive customers just as a rival seeks to enter or expand to become a major challenger, or that seeks to deny rivals a foothold in a flagship customer as a platform for future sales efforts, may still be exclusionary even if the number of affected customers is low.

How can the Priorities Guidance be applied to multi-tier rebate schemes?

The Priorities Guidance only considers a "one shot" rebate scheme. A single volume threshold is set (say 100,000 units) and a rebate granted (say 10%) if that threshold achieved. In practice, one shot volume thresholds are rare. Generally, the supplier offers a series of targets with a corresponding increase in percentage rebate attached (e.g. 7% for 70,000, 8% for 80,000, 9% for 90,000 and 10% for 100,000).

The *Velux* case explains how to analyse these types of scheme. They are essentially less likely to foreclose than one-shot rebate schemes, as the customer does not fear losing the entire rebate if it misses a target. Rather, it drops down to the next but one rebate threshold. So it still earns some rebate. The contestable share analysis need only be run on the amount foregone, not the entire rebate potentially earned.

In the above example, if the customer fails to hit the final threshold of 100,000, it earns instead 9% for the next lower threshold. The amount foregone (10-9 = 1%) divided by the contestable share (say 10% of demand) plus the rebate level for the next tier down (9%) gives an effective price reduction of (1%/10%+9% =) 19%. If margins in this industry are likely to comfortably cover a 19% discount, then the scheme is unlikely to foreclose.

How do you address multi-tier rebate schemes?

The Priorities Guidance assumes a rebate covering a single product within a discrete economic market. The reality tends to be a rebate based on volume of "spend" of the customer across multiple economic markets within a particular business group/division of the supplier. *Post Danmark II* is a good example.

Customer "spend" between statutory monopoly small letter bulk mail and deregulated (greater than 50g) bulk mail as well as between geographies where the smaller rival was present (greater Copenhagen) and those where it was not (the rest of Denmark) were all subject to the rebate scheme. In addition, the supplier may only be dominant in some lines, which brings additional complexity.

Although the Priorities Guidance does not directly address volume-of-spend multi-product rebate schemes, similar principles should be applicable. These types of schemes require much greater caution in the calculation of the contestable share, since the dominant company's range of products (and as such, the assured base) will be higher than rivals selling only one or two products competing against the dominant company's portfolio. In providing advice in these fact patterns, a similar analysis applies to that which is set out in the Priorities Guidance, since the dominant product lines will indicate a substantial uncontestable share and standalone vendors will have difficulty selling against a portfolio vendor with at least one dominant line in the portfolio. Where the analysis shows foreclosure risks, the advice may simply be to cut the dominant products out of the scheme and/or to offer separate incentives on that product.

The multi-product rebate problem

The Priorities Guidance defines a multiproduct rebate as “mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.” A classic example of this would be “get EUR2 off when you buy shampoo and conditioner together”.

The test applied is to work out whether incremental price (say, the conditioner price less the EUR2 discount) covers the incremental cost (the cost of the conditioner). It is not intuitively easy to apply this to schemes where there is no condition that more than one product be purchased to trigger the rebate. Rather, the condition is just a value target (say EUR100,000) which can be satisfied by buying any of the supplier’s products. The customer could buy 100,000 of shampoo, or 100,000 of conditioner, or 50,000 of each, and it would still get the rebate.

The incremental price/cost test is difficult to apply for the same reason. There is no obvious tied product to apply it to, because it is unclear what is being “tied."

An alternative approach, working on the same basic principles as the Priorities Guidance, is to ask how much of the EUR100,000 spend is contestable for a monoproduct rival (bearing in mind that will be a very small amount when there is a dominant product covered by the scheme). Then the effective price can be worked out in the same way as a monoproduct retroactive rebate scheme.

- Bill Batchelor is a partner and Sophia Real a senior associate in Baker Mckenzie's European & Competition Law Practice, Brussels.
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