

Chilling: ICA Fines Unilever/Algida €60 Million for Ice Cream Rebate Schemes

IN SHORT

The Background: The Italian Competition Authority has imposed a €60 million fine on Unilever's Italian subsidiary Algida, which sells impulse ice creams, for having implemented a complex system of exclusivity clauses and rebate schemes aimed at excluding competitors from the market.

The Result: This is the first European Competition Authority decision dealing with exclusionary rebates that provides a possible interpretation of the European Court of Justice's recent *Intel* ruling.

Looking Ahead: The ICA's actions appear to indicate that there is no legal obligation to run a price test, or AEC test, to prove that a dominant firm's rebate scheme is abusive, when clear evidence illustrates that tangible foreclosure effects exist as a result of such rebate practices.

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In 2015, the Italian Competition Authority ("ICA") launched an in-depth antitrust investigation into exclusivity agreements implemented by Unilever's Italian subsidiary Algida, which is active in the market for single-wrapped impulse ice creams, following a complaint filed by a small Italian producer of ice lollies.

The ICA thoroughly assessed three main aspects of Algida's commercial practices, which the authority categorized as:

- Commitment to provide retailers with freezer cabinets without any charge, on the condition that retailers would not stock competitors' products in the freezer (i.e., freezer exclusivity).
- Concession to retailers of rebates that were retroactive, incremental, and conditional upon the retailers' meeting some selling targets, with the aim of strengthening the loyalty-inducing effects of such schemes.
- A strict monitoring policy by which Unilever penalized customers that breached exclusivity clauses, pressured retailers into buying its least successful products alongside its most successful ones, and paid trade associations to monitor their members' compliance with the company's overall loyalty-inducing strategy.

After recalling the principles set forth in the Article 102 TFEU Guidance Paper (§ 36) of the Commission, the ICA argued that exclusive purchasing obligations, by nature, are capable of foreclosing rivals that are in a position to compete for the full supply of customers and, even more, less-efficient competitors with a limited range of products. Such foreclosure effects are exacerbated when associated with long-term contractual obligations and switching costs linked to specific rebate schemes.



In drawing its conclusions, the ICA extensively referenced leading case law concerning rebates and also went through the recent *Intel* case.



Against this background, the ICA went on to reject Unilever's price test on the basis that, whenever tangible foreclosure effects by a dominant undertaking hit a substantial part of the market (30–50 percent in this case), such effects cannot be justified by showing that there would be a hypothetical contestable part of the market sufficient to accommodate a limited number of as-efficient competitors.

In drawing its conclusions, the ICA extensively referenced leading case law concerning rebates and also went through the recent *Intel* case (C-413/14 P). In that case, the European Court of Justice ("ECJ") annulled the General Court judgment by ruling that even with respect to exclusivity-inducing rebates—which are presumptively unlawful—the Commission is nonetheless required to analyze the capacity of the rebate to foreclose where the undertaking provides supporting evidence to the contrary (§138). In particular, the Commission is required to assess all the relevant circumstances of the case necessary to establish foreclosure effects (§139). In the same vein, to properly weigh favorable and unfavorable effects of the practice on competition, the Commission is also required to conduct an analysis of the intrinsic capacity of a rebate scheme to restrict competition by assessing whether as-efficient competitors may challenge the dominant firm's commercial practice. To this end, if a price test ("AEC test") had been conducted to assess the potential of Intel's rebates to foreclose, this test should not have been dismissed as an irrelevant piece of evidence for the purpose of proving the abusive nature of Intel's rebate

practices.

Main Significance of the Case in Light of the *Intel* Ruling

The Alga case represents the first decision of a national competition authority since the European Court of Justice's *Intel* ruling and following the United Kingdom's antitrust enforcer dropped an [investigation](#) against Unilever, after finding ice cream suppliers' promotional deals with retailers for single-wrapped impulse ice creams did not affect customer purchasing patterns.

The ICA drew analogies and differences with the *Intel* ruling, holding that unlike the fidelity rebates granted by Intel (potentially replicable by as-efficient competitors), Unilever imposed exclusivity obligations that, by definition, have exclusionary effects, especially when associated with long-term contractual obligations and switching costs linked to specific rebate schemes. In this respect, the ICA held that the discounts applied by Unilever were abusive not because they forced as-efficient competitors to sell below cost but because they were part of a complex exclusionary strategy that could not be assessed based on the AEC test. Therefore, in this case, the result of the AEC test as provided by Unilever was not deemed sufficient to rebut the presumption of unlawfulness of the exclusionary conduct put into place by Unilever.

Reading between the lines, the ICA seems to argue that there is no legal obligation to run the AEC test to prove that a rebate scheme by a dominant firm is abusive, to the extent that cogent evidence has been collected showing that tangible foreclosure effects exist as a result of such a practice. In any event, fulfilling the AEC test is not sufficient for a dominant firm to avoid scrutiny.

THREE KEY TAKEAWAYS

1. The ECJ's *Intel* ruling is starting to influence the enforcement practices of national competition agencies across the European Union with respect to abuse of dominance investigations involving fidelity rebates.
2. The ICA is the first national competition authority in the European Union having to deal with, and trying to contain, the potentially far-reaching implications stemming from the *Intel* ruling, particularly in connection with the application of the AEC test.
3. The ICA's decision might inspire the Commission to endorse a narrow reading of the *Intel* ruling, namely that while there should not be a *per se* approach to rebate schemes, neither should there be an obligation for a competition agency to run an AEC test in order to prove that a fidelity rebate scheme is abusive.

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