

The Intel Judgment:

Practical Implications for Pricing Strategies

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Historical Background

- ***European Sugar Industry (1973)***
 - In a case involving primarily market-sharing agreements among European sugar producers, a system of rebates conditional on exclusivity is found to be an abuse of dominance.

- ***In Hoffman-La Roche (1979), a distinction is made between:***
 - Quantity rebates exclusively linked to the volume of purchases from the producer concerned -- generally valid

 - Fidelity rebates, the amounts of which are disconnected from the quantities purchased, and which explicitly tie a customer to a supplier for all or most of its requirements -- generally illegal.

Historical Background

- In *Michelin I* (1983), the Court of Justice upholds the creation of a third category of rebates – “fidelity-building” rebates – which resemble quantity rebates, but are analyzed as having the same effect as fidelity rebates, such as retroactive rebates for annual sales targets which may correspond to exclusivity or near exclusivity
- “Fidelity-building” rebates require the consideration of all the circumstances
- See also *Michelin II* (2006), *British Airways* (2007), *Tomra* (2012) and *Post Danmark II* (2015)

The Modernisation of Article 102

- **Following the Article 101 modernisation initiative in the late 1990's, an “effects-based” approach to the interpretation of Article 102 (as opposed to a “form-based” approach) gains traction within the Commission**
 - **In 2005, the Commission published its Staff Discussion Paper to discuss the application of Article 102 to exclusionary abuses**
 - **In 2009, the Commission issued its Guidance Paper on its enforcement priorities in applying Article 102 to abusive exclusionary conduct by dominant undertakings**
 - Clearly states that its provisions do not overrule past case law

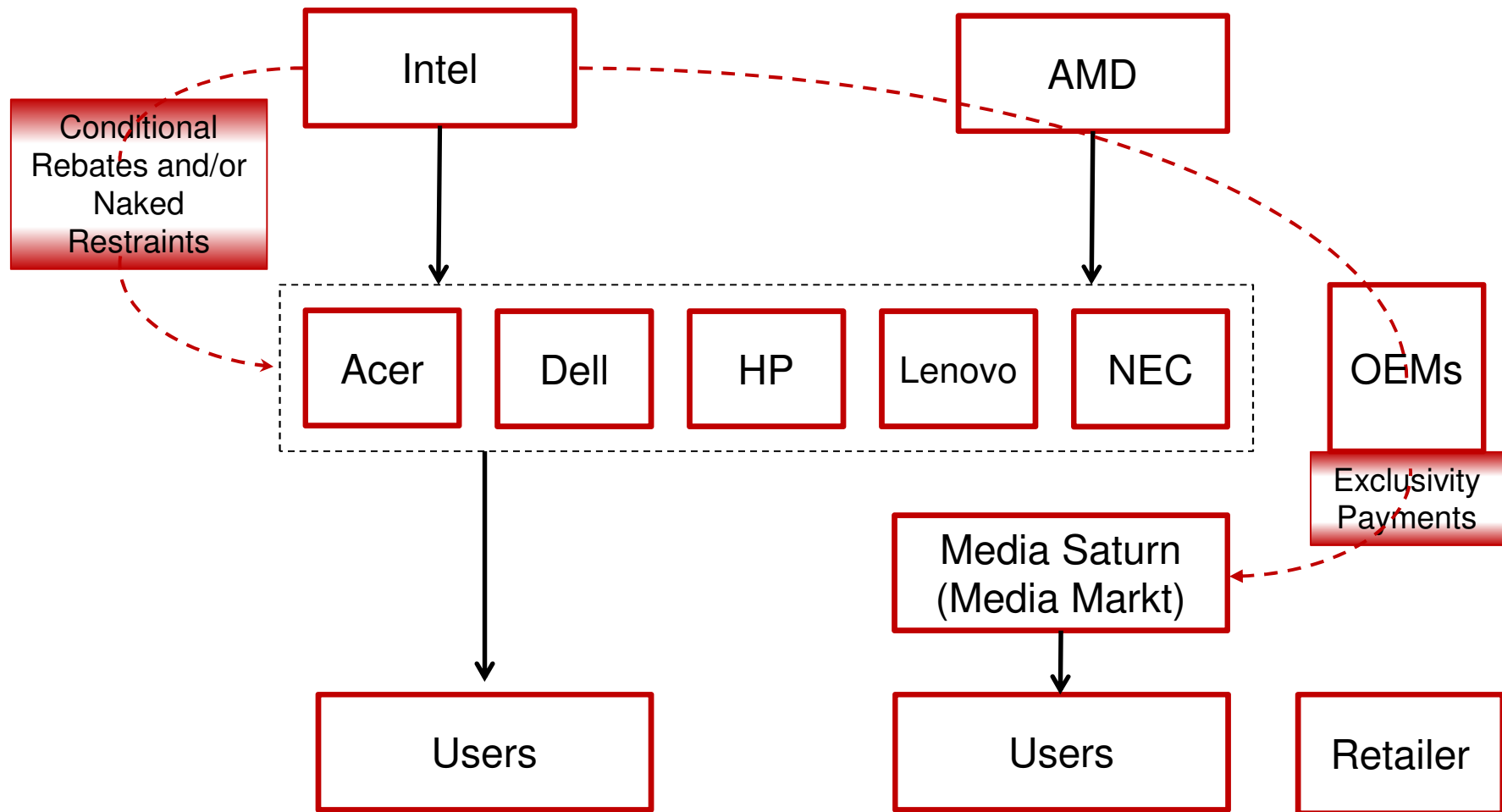
Article 102 Guidance Paper: AEC Test

- **In its Article 102 Guidance Paper, the Commission discusses rebates in which the “as-efficient-competitor” test is developed**

23. “[...] Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant”

25. “In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing [...]”

Background of the *Intel* case

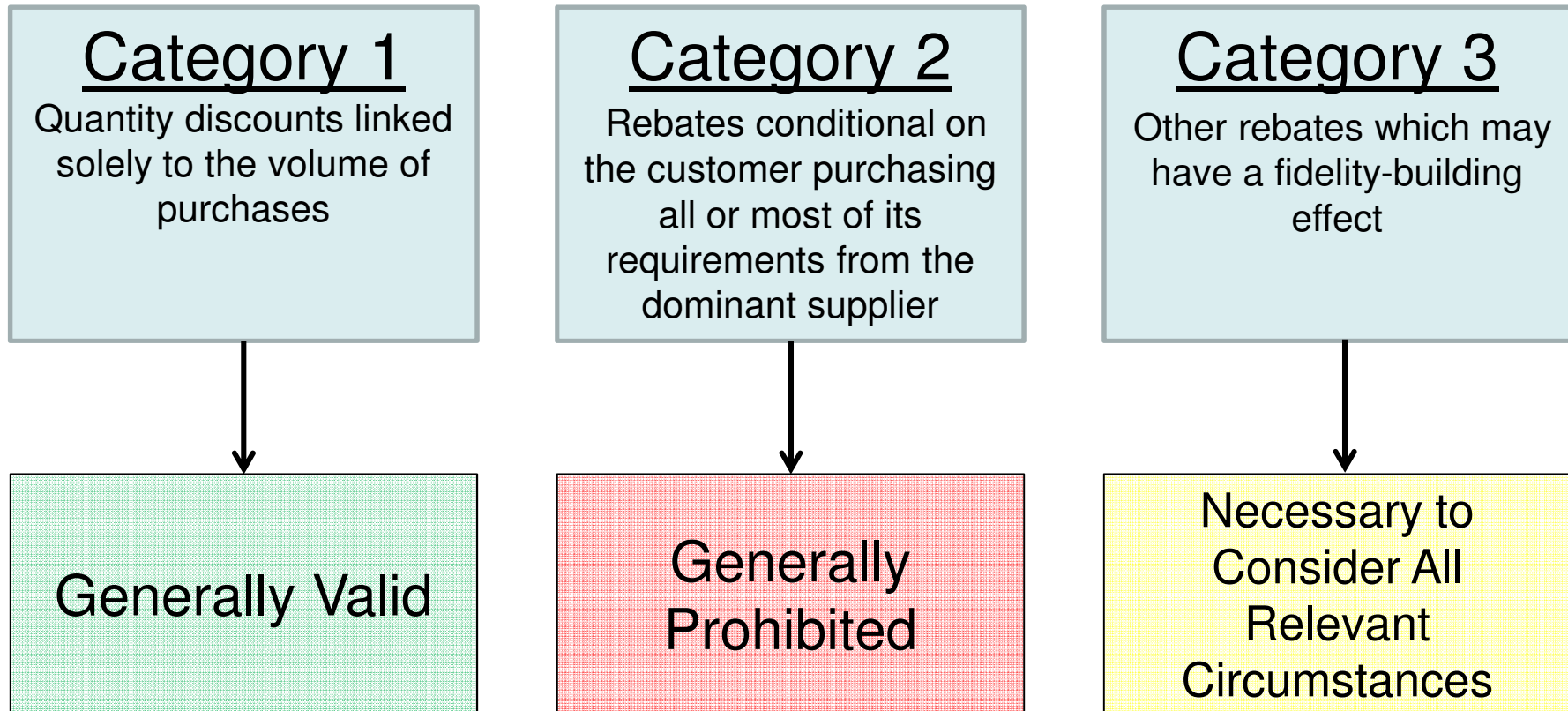


Examples of Alleged Abusive Practices

- **Rebates conditional on a computer manufacturer purchasing exclusively Intel CPUs**
- **Rebates conditional on a manufacturer purchasing no less than 80% of its CPU needs for its desktop and notebook computers from Intel**
- **Payments to retailer Media Saturn Holding on condition that it exclusively sold Intel-based PCs**

The Commission decided that Intel's rebates and exclusivity payments constituted an abuse of Intel's dominant position, and imposed a fine of €1.06 billion

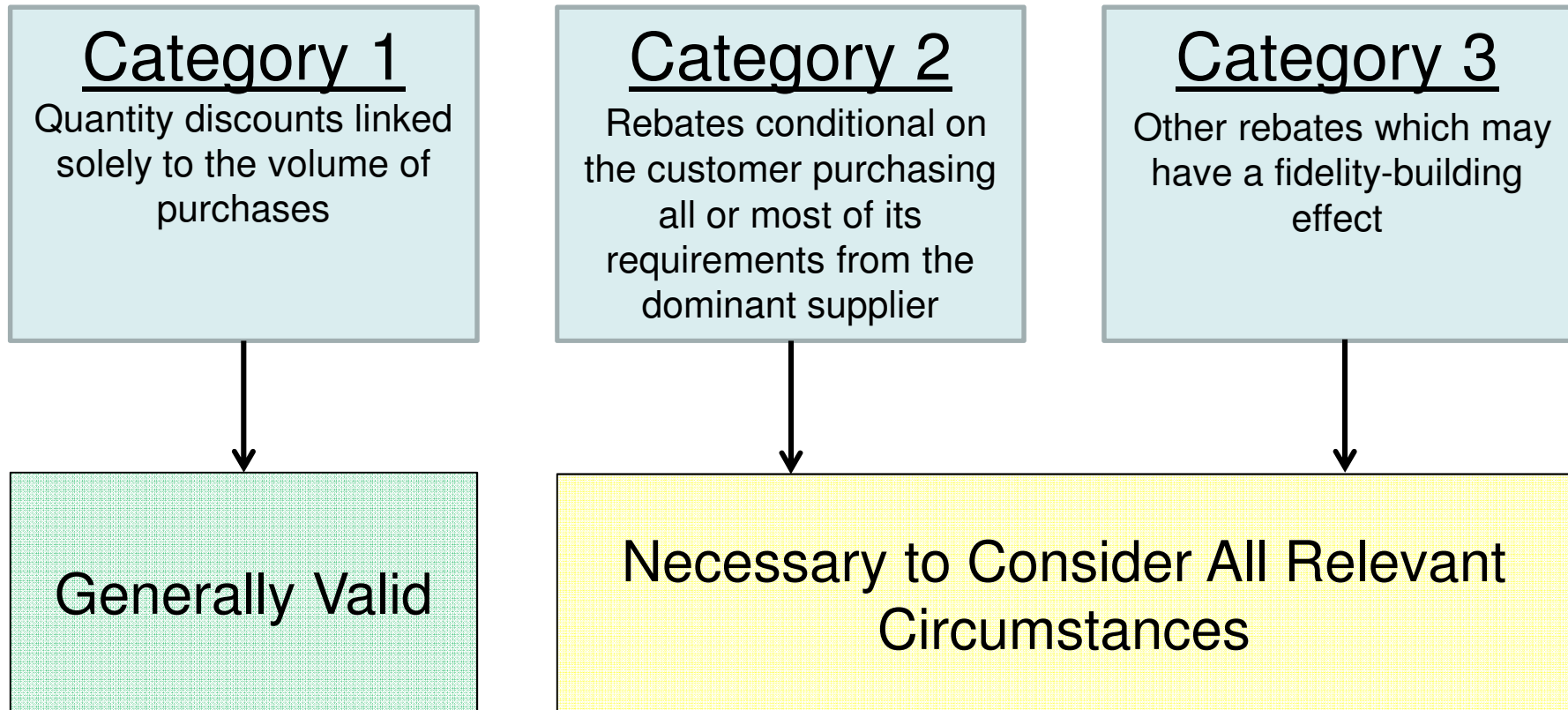
General Court Categorization of Rebates



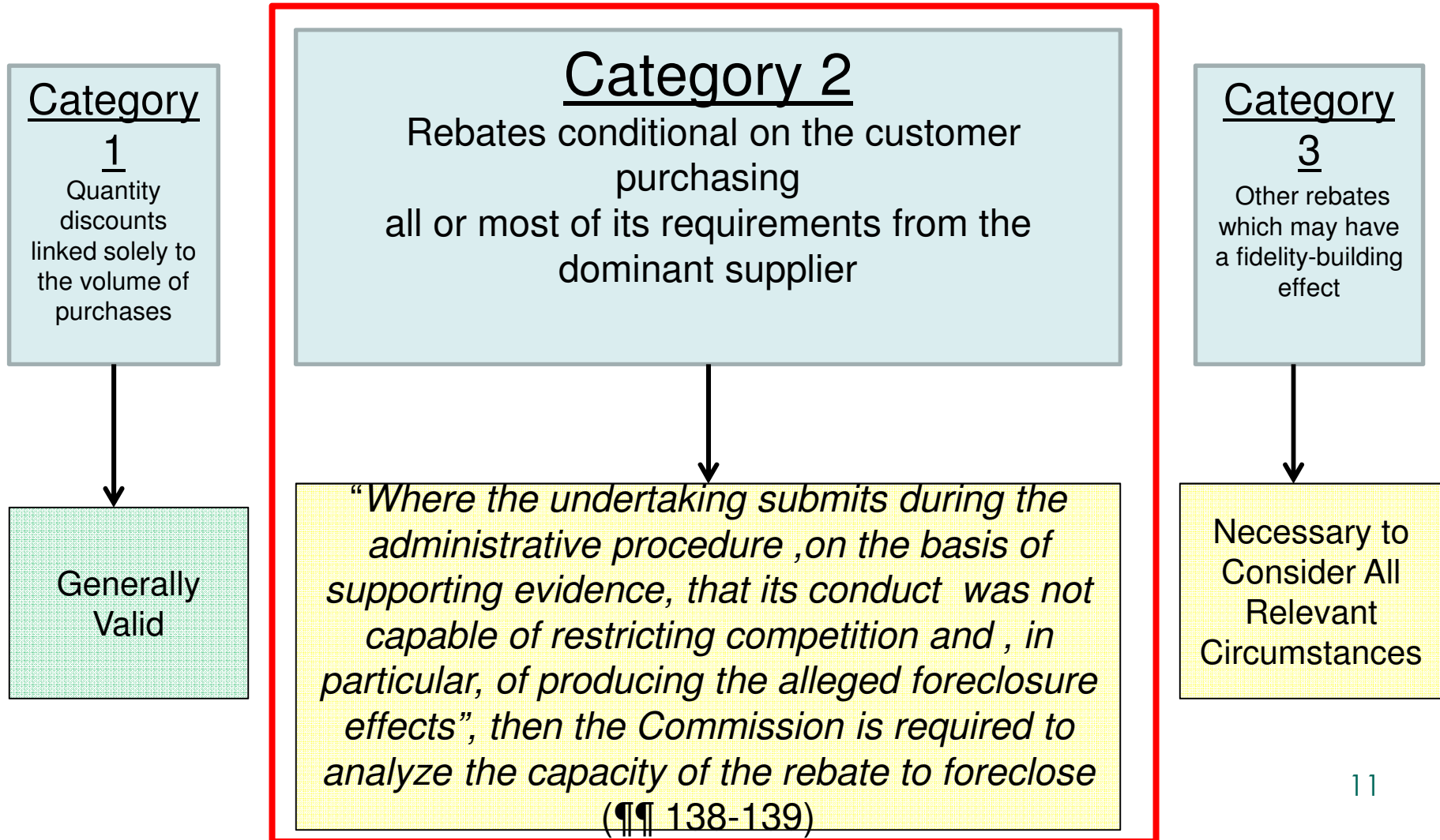
General Court Categorization of Rebates

- **The General Court considered that Intel's rebates were Category 2 rebates, which are effectively unlawful by their very nature. There was no need to examine "all the relevant circumstances" of the exclusive rebate, such as:**
 - **the level of the rebate**
 - **the duration of the rebate**
 - **the market coverage affected by the rebate (no *de minimis* rule)**
 - **the scope of the rebate (the fact that the rebate covers only a segment of the customer's requirements is irrelevant)**

Advocate General Wahl's Categorization of Rebates



Court of Justice



Court of Justice Assessment of Rebates

- **According to the Court of Justice, the Commission is required to analyze (¶ 139):**
 - **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, including duration and amount**
 - **The possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market**

The “As Efficient Competitor” Test

- In its Decision, the Commission carried out an AEC test and concluded that its analysis supported the conclusion that Intel’s rebates were abusive. However, the Commission stressed that the AEC test did not form part of the Decision. It argued before the Court that this aspect of the Decision was not reviewable.
- As a result, the General Court did not address Intel’s criticisms of the application of the AEC test by the Commission (¶ 146)
- The Court of Justice set aside the judgment of the General Court for not analyzing whether the rebates at issue were capable of restricting competition and for failing to consider Intel’s arguments challenging the Commission’s application of the AEC test (¶ 147)

Objective Justification

- **The Court of Justice considered the analysis of the capacity to foreclose relevant in assessing whether a system of loyalty rebates which, in principle, falls within the scope of Article 102, may be objectively justified (¶ 140)**
 - *“It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer”*
 - *“[The] balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking”*

A Few Questions Raised by the Judgment

- **Is the AEC test required in all cases involving loyalty rebates?**
- **The Court refers to market coverage. What degree of market coverage? Should the exemption applicable to exclusive agreements that is contained in the Vertical Block Exemption Regulation (i.e., below a 30% market share threshold) also apply to fidelity rebates?**
- **Does the Court ruling apply to Category 3 rebates?**
- **Does this judgment give companies more leeway in designing their discount schemes?**
- **What are the broader implications of this judgment for EU competition policy?**