



The *Intel* Decision:

**Rival Theories of
Consumer Harm**

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9th December 2009
Annual CRA Conference, Brussels

Disclaimer

- Though CRA worked for Intel throughout the European Commission's investigation, I did not work on this case myself
- The views expressed in this presentation are completely my own personal views

Assessment of Loyalty Rebates in *Intel*

- In *Intel* the Commission implements the empirical ‘As-Efficient Competitor’ (AEC) test for rebates put forward in the 2009 Guidance document
 - The test compares Average Avoidable Costs to a constructed measure of “Effective Price”
 - According to the Commission’s Decision, the application of the test shows that Intel foreclosed its main rival AMD from some key customers (OEMs)
- The move away from the purely form-based approach to rebates applied by the Commission as recently as in *Tomra* (2006) is a welcome and significant step
- The *Intel* Decision however raises a number of issues about the relevant theory of consumer harm in rebate cases

Are Loyalty Rebates simply “Predation in Disguise”...?

- The AEC test applies a quasi-predatory framework to loyalty rebates
 - Effectively interprets rebates as ‘disguised predation’: predatory incremental prices are ‘hidden’ by non-predatory prices on non-contestable units
 - This interpretation is consistent with the dominant firm engaging in profit sacrifice on incremental units
- As in any coherent theory of predation, it should be necessary to assess the scope for asymmetric future *recoupment* possibilities between the predator and the prey (as the Guidance paper itself recognises)
 - Deep pockets (possibly from the revenues on non-contestable units?)
 - Reputational/informational effects
- These issues however are not discussed in *Intel* decision
 - The Commission assumes that recoupment is *not* actually required for its theory of harm

...Or Are Rebates a Form of Leverage? (1/2)

- “[...] not all rebates genuinely benefit consumers. As regards conditional rebates by a dominant company, ***the fact that a "rebate" can be leveraged by the dominant company from its non-contestable share into the contestable share*** may allow that company to foreclose as efficient, or even more efficient rivals, even if its overall average price is higher than that of its rivals. This is therefore to the ***detriment of consumers*** and competition both ***in the short and in the long term***, in terms of price, choice and innovation.” (¶1612)
(emphasis added)

...Or Are Rebates a Form of Leverage? (2/2)

- It is true that if Intel is an unavoidable trading partner with respect to certain sales, then if it offers a R% discount on all units as part of a competition for N additional (contestable) units, AMD would have to offer a discount for these contestable units that is greater than R%.
 - But Intel's ability to express the discount as a % of total sales (rather than just incremental sales) is not a source of economic leverage *per se*
- Theories of bundled rebates as a form of leverage require a richer set of assumptions which need to be tested empirically
 - Profit sacrifice may not be present in these theories, but
 - Consumers may however also not be harmed by the conduct (i.e. rebates might simply be a form of efficient discount pricing)

Loss of Choice as a Source of Consumer Harm (1/2)

- The *Intel* Decision also claims that Intel's rebates harmed final consumers by depriving them of product choice
 - “[...] Intel was able to use the tool of conditional rebates that were capable of inducing loyalty and thereby limiting consumer choice and foreclosing the access of competitors to the market” (¶1598)
- Rebates to end-consumers should be treated as presumptively beneficial since the loss of choice accepted by consumers is *compensated for* by the discount

Loss of Choice as a Source of Consumer Harm (2/2)

- Are consumers harmed because the rebates were paid to intermediate customers, who may not adequately represent their interests?
- If so, one needs to explain why competition between OEMs does not lead to a significant pass-through of rebates to final consumers (or does not allow OEMs that carry AMD to gain share at the expense of Intel 'loyalists')
- The implicit assumption that intermediate customers 'pocketed' the rebates with limited benefit to end-consumers is likely to be the exception (cf. *British Airways*), and not the rule

Conclusion

- The empirical application of the AEC test for rebates in Intel is a welcome development
- The test should however be used primarily as a *screen* to detect rebate structures which raise competition concerns
- For future cases it would be helpful if the theory of consumer harm from rebates is more explicitly set out and tested, distinguishing between rival candidates
 - Predation
 - Leverage
 - Loss of choice for final users

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