

# The Intel Judgment:

## Practical Implications

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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

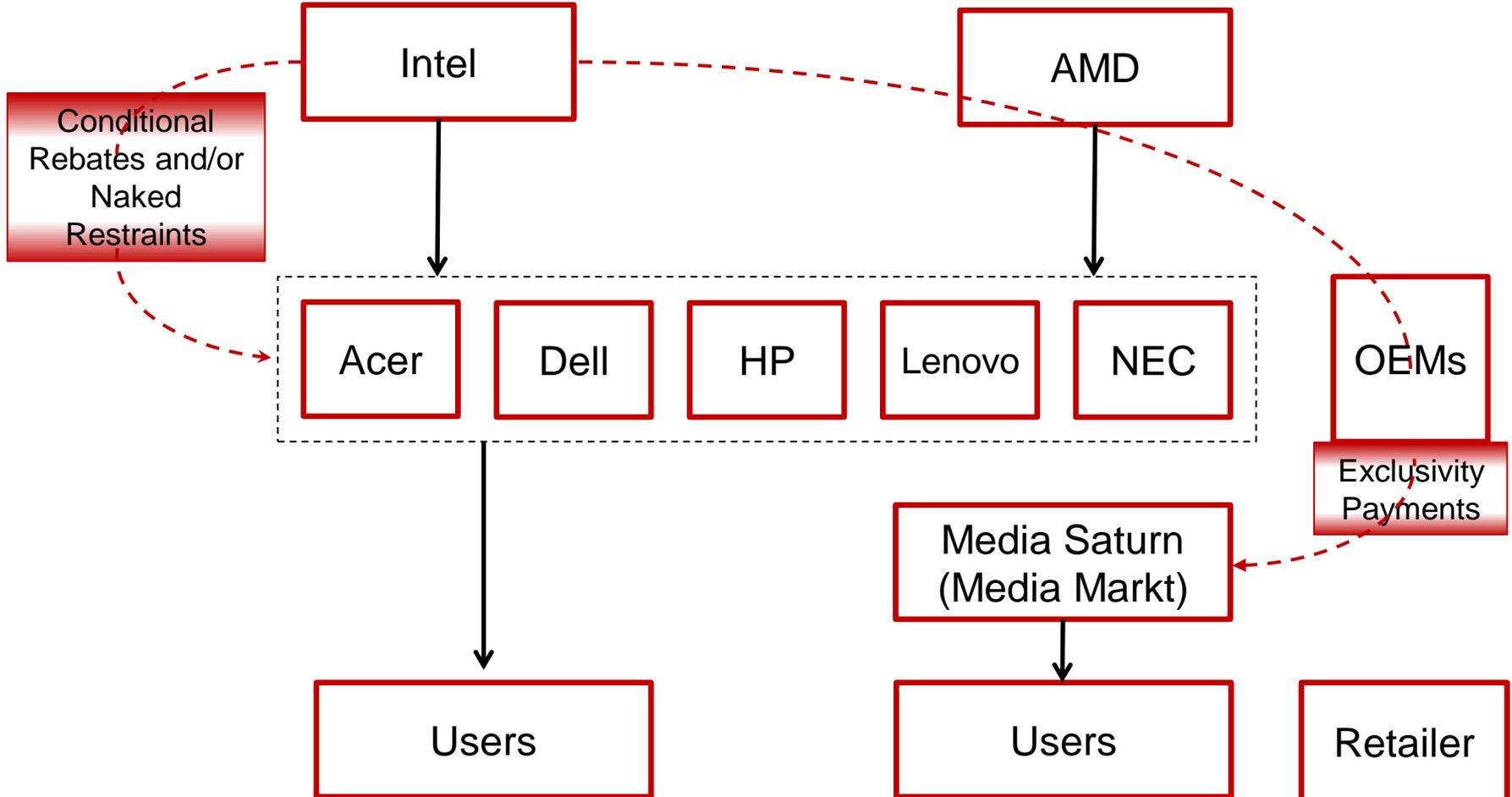
## **Article 102 Guidance Paper: AEC Test**

- **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**

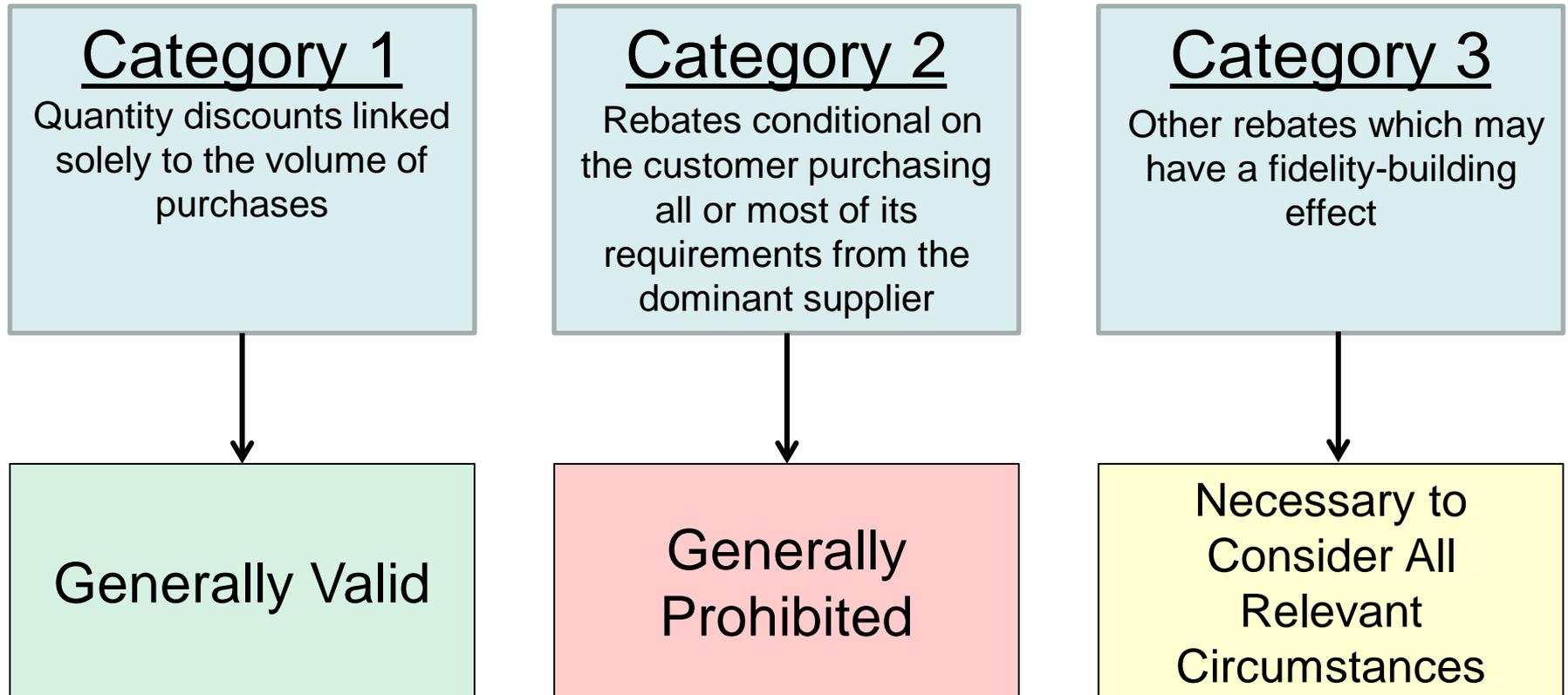


## **Examples of Alleged Abusive Practices**

- **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**

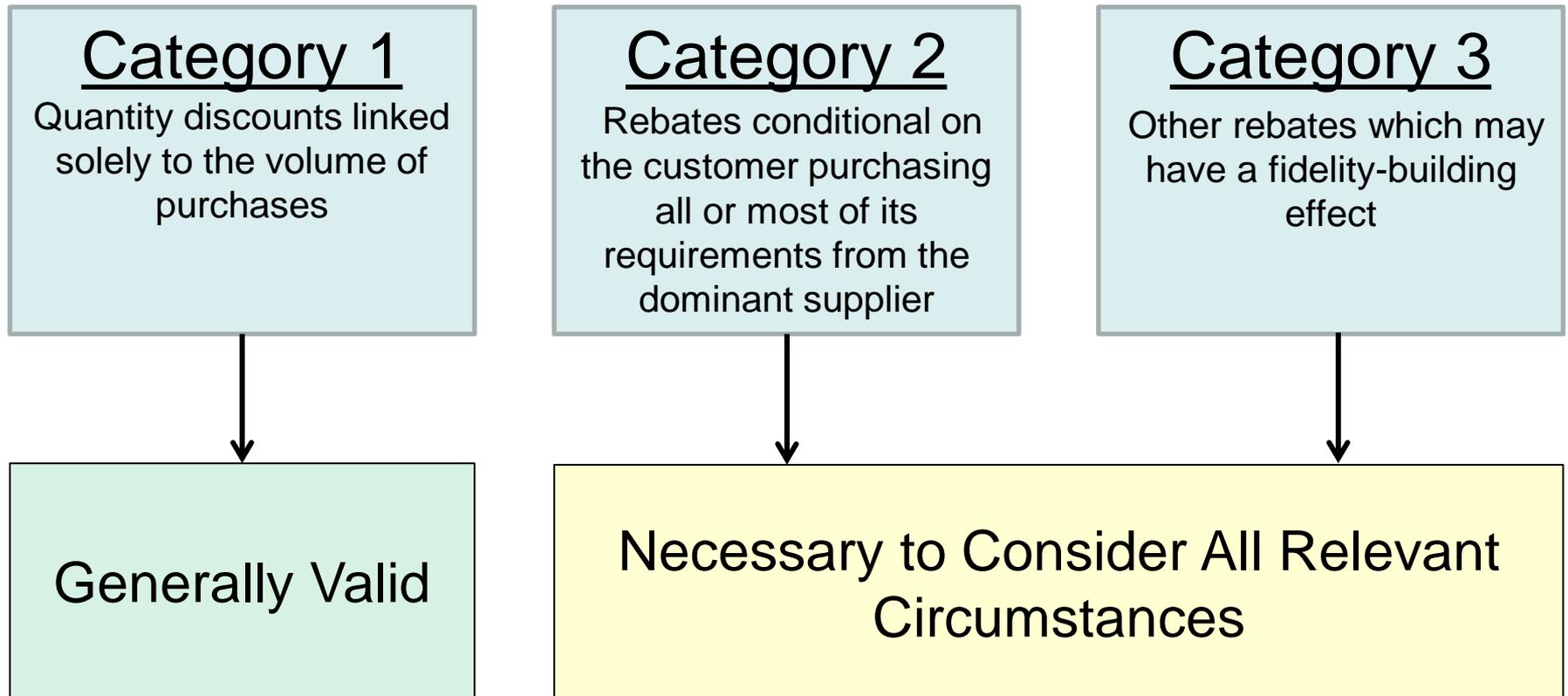
**General Court Categorization of Rebates**



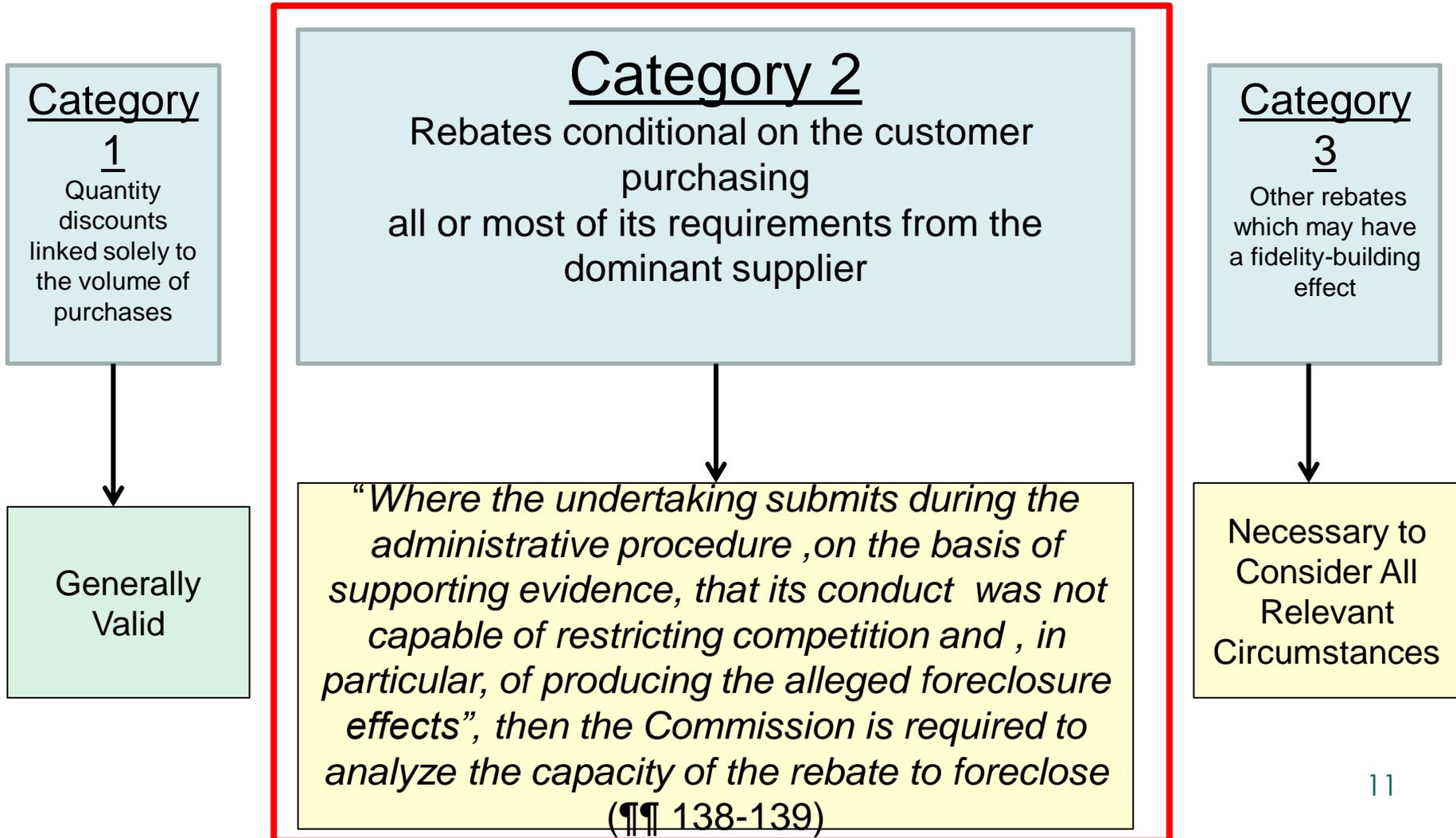
## **General Court Categorization of Rebates**

- **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”*

## **Jurisdiction**

- Until the present judgment, the decisive factor in determining whether the Commission may exercise jurisdiction was the place where an agreement was implemented (see, C-89/85, *Woodpulp*)
- For the first time, the Court of Justice considered that the Commission may exercise its jurisdiction under the “qualified effects” approach (¶¶ 45-46)
  - According to the “qualified effects” test (see, T-102/96, *Gencor*), the Commission may exercise jurisdiction over agreements concluded in third countries that have foreseeable, immediate and substantial effects in the internal market
- The Court of Justice also considered that the “qualified effects” test could be met based on the conduct of the undertaking viewed as a whole (¶¶ 56-57)

## **Rights of Defence**

- **The Court of Justice made the following findings in relation to Intel’s rights of defence during the administrative procedure:**
  - The General Court erred in distinguishing between a “formal” interview and an “informal” interview under the meaning of Article 19(1) of Regulation 1/2003 (¶ 87)
  - If the Commission decides to carry out an interview, it must be recorded in full. This is without prejudice to the freedom for the Commission to choose on the type of recording (¶ 90)
  - The General Court erred when it concluded that the disclosure of a internal note to Intel had remedied the lack of a record of the interview in question (¶ 92)
- **However, the Court of Justice considered the errors of law were not capable of leading to the annulment of the Decision (¶ 102)**
  - Intel did not adduce evidence to suggest that the Commission failed to record exculpatory evidence that could have been useful for its defence (¶ 100)
  - Intel did not request that the person interviewed, Mr D, be summoned before the General Court, nor attempted to contact him (¶ 101)