

# Rebates revisited (again) - practical advice after Intel

EU Competition Law Briefing

Brian Sher, Partner, Head of Competition and Trade, UK

in discussion with

Dr Michael Bauer, Partner, Head of the CMS Competition & EU Group

29 April 2022

# Agenda



**Rebates – recap**



**The Intel saga**



**Practical discussion**

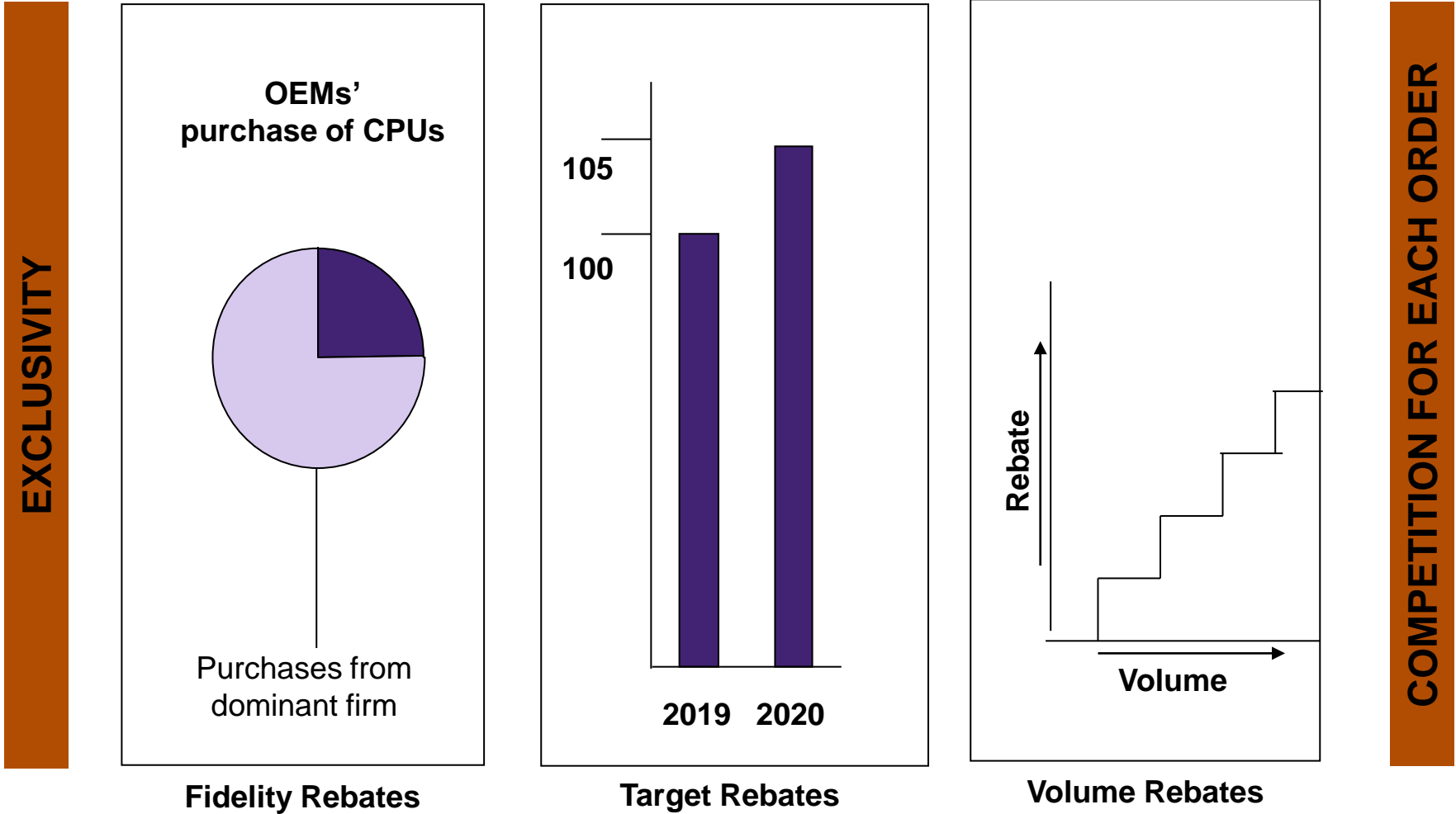


# Rebates - recap

# (What's so funny about) rebates, discounts and low prices?

1. Only an issue for dominant firms
2. It's not just a discount:
  - a. Conditional – on some measure of volume over time
  - b. Structures that incentivise loyalty
3. Triggers and rewards (next two slides)

# Rebates – the trigger



# Rebates – the reward – what is discount paid on?

## What is discount paid on?

Particular focus on:

- **retroactive rebate** schemes (pay on **total volume up to trigger**)
- *cf.* incremental schemes (pay on volume above trigger)

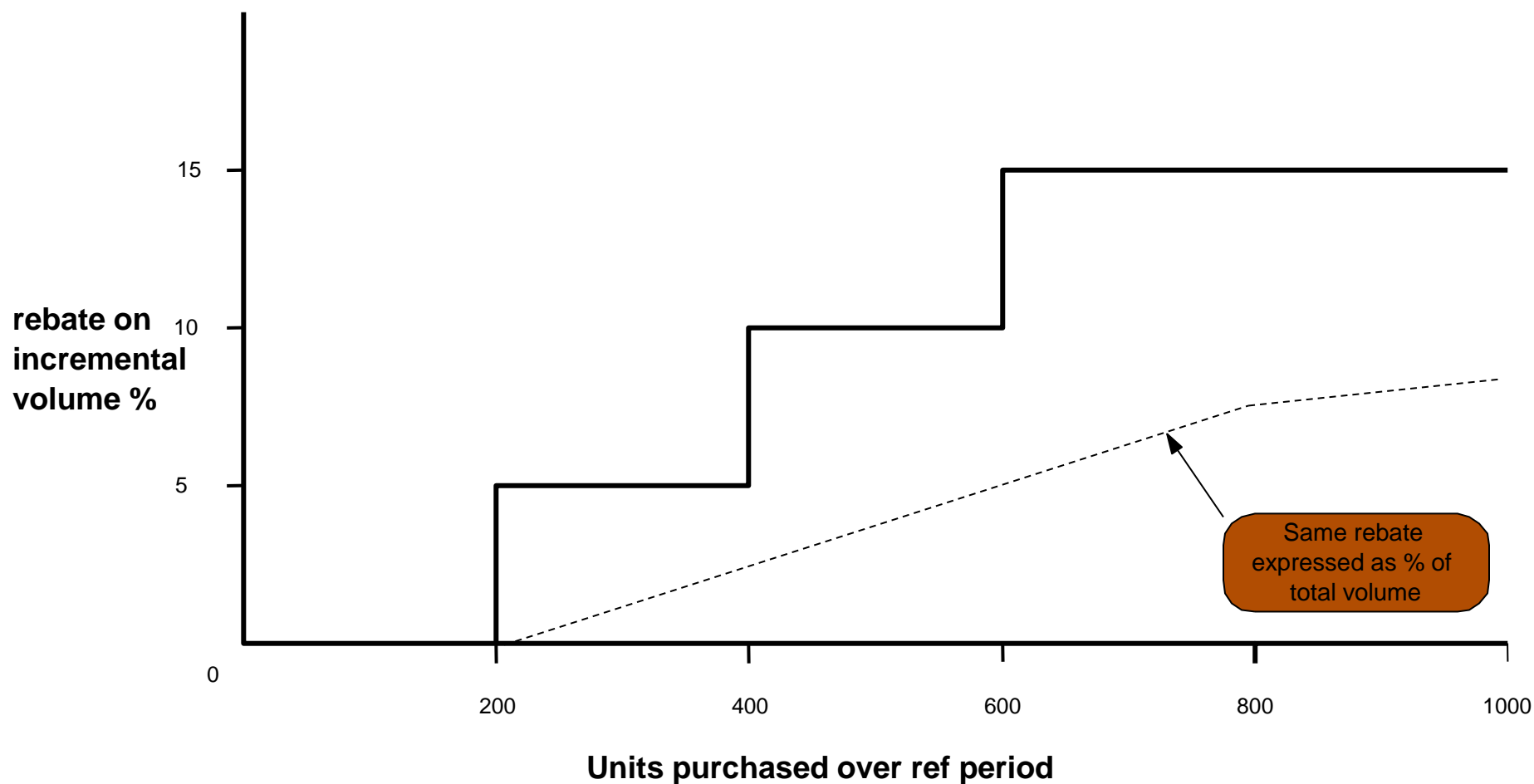
Analytical approach (DG Comp 09 guidelines):

- allocate entire rebate to “contestable share” of dominant firm’s sales during reference period
- compare with costs of “as efficient competitor” (**AEC**)

## Example

- D sells 100 x 1 EUR units to customer X
- 10% discount for exclusivity
- 60 assessed non-contestable
- Competitor can go for 40 EUR max, must offer 25% discount to compete

# Why pay on incremental units tends to attract less scrutiny





# The Intel Saga



# Intel – facts and Commission Decision, 2009

- Intel dominant position in x86 computer processing units (CPU) market
- Rebates to leading PC retailer and series of OEMs – *conditional on exclusivity / near-exclusivity*
- “Naked restrictions”, e.g. payment to delay AMD machine
- Targeting specific competitor, AMD (complainant)
- Commission ran AEC analysis, found Intel failed it, EUR 1Bn fine

# Commission Decision, 2009, contd.

Contestable share: what did Commission look at?

- Principally internal data from customers indicating their ability to shift supply
- Complicated in cases of Intel exclusivity
- History
- Documents
- Where no other data, used AMD's share of global retail market as a proxy

## Eight years later....*Intel* CJEU, 2017

- Cites strict *Roche* prohibition on rebates based on “all or most” of customers’ requirements
- States that this needs to be “further clarified”
- 5 factors in particular need to be analysed (if put forward):
  - **Extent of dominance**
  - **Coverage**
  - **Conditions and arrangements of rebate**
  - **Duration and amount**
  - **Whether strategy to exclude AEC’s**
- Lot of emphasis on excluding efficient competitors
- Annulled and remitted to GC for failure to analyse AEC test

# Five years after that..... *Intel* remittal, GC judgment, January 2022

## 1. Requirement to apply all five CJEU factors

## 2. AEC test (illustrative examples from judgment)

- a. **Dell** – Commission relied on Dell spreadsheet to establish 7% as CS.  
Issues: (i) Intel's arguments on legal certainty rejected; but (ii) Dell documentary evidence suggested could switch up to 25% of D's demand to AMD
- b. **HP** – Commission's data didn't cover whole relevant period; and not precise enough about alleged "*reinforcing factor*" concerning threat of transfer of rebates intended for HP to its competitors
- c. **NEC** – Commission's own data showed AEC test not met and Commission incorrectly calculated value of business at risk for Intel

# GC remittal judgment, Jan 2022, contd.

## 2. **AEC test** (illustrative examples from judgment) (contd.)

### d. **Lenovo** – fundamental misapplication of AEC

- i. Need to put competitor in same shoes as Intel (minus only the sales base, hence across contestable share)
- ii. Therefore should consider competitor as offering same non-cash advantages as Intel not without – example of supply hub in China (§437)

### e. **MSH** – analysis erroneously based on single quarter – insufficient data to extrapolate from

# GC remittal judgment, Jan 2022, contd.

## 3. Coverage

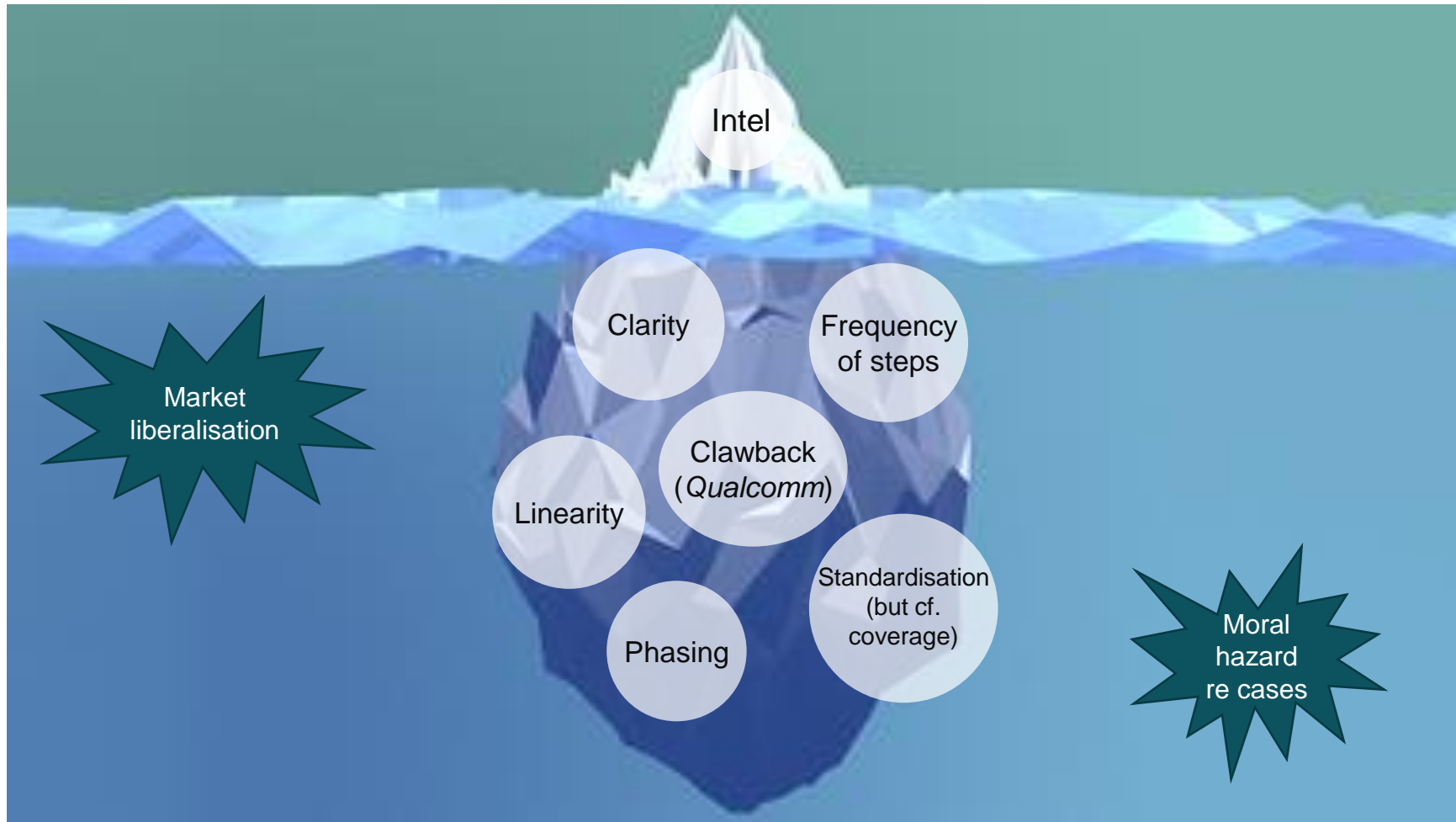
- a. Flaws in analysis (time period, which hardware) etc. 14% vs 25% vs ??? not addressed because not in decision
- b. Not just about %. Strategic importance

## 4. Duration

- a. Analysing time horizon for OEM decisions not enough. Need to look at negotiation patterns (shorter here)
- b. Analysis needs to be “*thorough and exhaustive*” - “*haphazard and limited*” here

➔ **Net net: Commission has to do the analysis and has to do it well!**

# Selected other points (aka *Intel* is the tip of an iceberg...)



# Discussion



# Thank you for joining us!



**Your free online legal information service.**

A subscription service for legal articles  
on a variety of topics delivered by email.  
**cms-lawnow.com**

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

**CMS locations:**

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

**cms.law**