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The ECJ Intel judgment: an important step towards a more effects-based approach in abuse of dominance cases.

On 6 September 2017, the European Court of Justice ("ECJ") delivered its judgment in the Intel case. The ECJ, sitting in Grand Chamber, set aside the 2014 General Court ("GC") judgment because the latter had failed to consider Intel's arguments against the "as efficient competitor" ("AEC") analysis that the European Commission ("EC") had carried out in its 2009 decision. The ECJ referred the case back to the GC for further consideration.

The ECJ held that the EC needs to analyse all the relevant circumstances invoked by the dominant companies in its assessment of whether loyalty rebates are illegal. In addition, the GC on appeal must review all of the dominant company's economic arguments against the EC's assessment, and cannot rely only on the exclusive nature of the rebates to confirm that they are illegal.

The judgment is also significant on the jurisdictional and procedural front. The ECJ confirms for the first time that a qualified effects test is sufficient to establish jurisdiction in an abuse of dominance case, and it also imposes on the EC an obligation to record all interviews with third party witnesses during an investigation.

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1. Background

The case originated with a complaint to the EC in 2000 by AMD, which ultimately led to the 13 May 2009 EC decision fining Intel a record €1.06 billion for abusing its dominant position in the x86 microprocessor or CPU market.

The decision found that Intel had sought to foreclose AMD by granting exclusivity rebates to some computer manufacturers and one retailer, and by making payments to some manufacturers as a *quid pro quo* for them to abandon or delay the launch of computers using processors made by AMD.

The EC believed that these exclusionary rebates and payments were by their nature illegal, and that it was therefore not necessary to demonstrate that they had anti-competitive effects. Nevertheless, the EC performed an extensive AEC analysis to show that these rebates and payments made it impossible for

an as efficient competitor to compete profitably.[1] This was the first time that the EC applied the AEC test in a decision, and it did so even though self-imposed guidance set out in the 2009 Enforcement Priorities Notice on Article 102 TFEU did technically not apply to the Intel case.

In its judgment, the GC upheld the Intel decision on all points of law and fact. The GC held in particular that the AEC test (and Intel's criticisms of that test) were irrelevant, given that the exclusivity rebates and payments were by their nature illegal.

Intel appealed to the ECJ and Advocate-General Wahl in his October 2016 opinion recommended that the ECJ uphold the appeal.

2. The ECJ judgment

Assessment of exclusionary rebates

In its judgment, the ECJ upheld Intel's appeal on the GC's failure to assess Intel's rebates in light of all the relevant circumstances.

The ECJ, citing *Post Danmark I*, recalled at the outset that the purpose of Article 102 TFEU is not to ensure that less efficient competitors remain in the market. The ECJ held that, as a result, "not every exclusionary effect is necessarily detrimental to competition", given that competition on the merits may by definition lead to the marginalisation or exit of less efficient competitors.[2]

The ECJ referred to the *Hoffmann-La Roche* case law and recognised that it resulted in a presumption of illegality for exclusivity rebates practised by dominant firms.[3] However, the ECJ continued with an important clarification: the EC should carry out a full assessment of all the relevant circumstances surrounding the rebate scheme if the dominant company *"submits […] on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects"* (para. 138).

The ECJ held that in such a case the EC is required to analyse not only the extent of the company's dominance in the relevant market, market coverage, and the conditions and the terms and conditions of such rebates, as well as their duration and value, but also the existence of a strategy aimed at excluding competitors that are *at least as efficient as the dominant company* (para. 139).

The ECJ also explicitly recognised the possibility of justifying the rebate based on efficiencies that benefit the consumer and that would counterbalance the exclusionary effects. The ECJ noted that the need to assess anti-competitive effects may be necessary to conduct this balancing exercise.

In applying the above principles, the ECJ concluded that the AEC test contained in the Intel decision should have played an important role, regardless of the fact that the decision itself explicitly stated that such an AEC test was not necessary for a finding of abuse of dominance (para. 143). As a result, the ECJ

[1] Intel Decision, paras 1002-1155.
[2] Case C-209/10, *Post Danmark*, paras. 21 - 22; Case 413/14P, *Intel*, paras. 133 -134.
[3] Case 85/76, *Hoffmann-La Roche*, para. 89; Case 413/14P, *Intel*, para. 137.

concluded that the GC was wrong to ignore Intel's arguments and criticisms of the EC's AEC test (paras. 144-147).

The case has now been referred back to the GC for a consideration of the factual and economic evidence in light of Intel's arguments (para. 148).

Duty to record interviews

The ECJ also confirmed that all interviews of third parties during an investigation should be recorded and made available to the defendant (paras. 89-91). The GC had rejected Intel's arguments in this respect, holding that the meetings and interviews in question were of an informal nature.

However, Intel's plea on this procedural point was ultimately rejected because there was no evidence that the EC used the information obtained during the interview to inculpate Intel (para. 95).

Jurisdiction

The Intel judgment also makes important points on the jurisdictional front. Up until now there had been two different jurisdictional tests: the qualified effects test set out by the *Gencor* case law, involving a merger, under which the EC has jurisdiction if the conduct in question has foreseeable, immediate and substantial effects in the EU,[4] and the implementation test set out in *Wood Pulp*, involving a cartel, according to which EC jurisdiction is established if the agreement or concerted practice is implemented in the EU.[5]

The ECJ clearly confirmed that both tests can be used to establish jurisdiction, and rejected Intel's argument that the qualified effects test is inappropriate for abuse of dominance cases. The ECJ noted that both the qualified effects and the implementation tests pursue the same objective, which is to prevent conduct which is liable to have anti-competitive effects in the common market (paras. 45-47).

The ECJ also rejected Intel's alternative arguments that the qualified effects test was not met because its agreements with Lenovo involved only a limited number of products and produced negligible effects in the EU. The ECJ held that the threshold for finding qualified effects in the EU is very low, noting in particular that the EC is entitled to rely on the probable effects of the overall conduct – in this case Intel's overall strategy to exclude AMD in the EEA and elsewhere – in order to establish that it is foreseeable that the conduct in question has immediate and substantial effects in the EU (para. 51). The ECJ noted that artificially segmenting each element of a broader strategy would enable companies to easily escape EU jurisdiction (para. 57).

Given that the qualified effects test was met, the ECJ did not consider Intel's arguments concerning the implementation test, noting that the GC merely examined that test for the sake of completeness.

[4] Case T-102/96, *Gencor*, para. 74.
[5] Case 89/85, Joined cases, *Wood Pulp.*

3. Comment

This judgment is a clear victory for the proponents of a more effects-based approach in the EC's enforcement. The GC Intel judgment was seen as a rejection of the economic principles in the 2009 Enforcement Priorities Notice, which were a self-imposed framework for the EC to move towards an analysis of abuse of dominance infringements based on more sound economic principles about protecting effective competition instead of competitors – often referred to as an "effects-based" analysis. The ECJ's judgment provides clear support for the 2009 Enforcement Priorities Notice and for those within the Commission who favour this effects-based approach. The judgment is a clear endorsement in favour of sound economic analysis in the enforcement of Article 102 TFEU and a continuing move away from formalism in the analysis.

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