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ALERT MEMORANDUM

Modernising Abuse of Dominance – the CJEU's *Intel* Judgment

October 16, 2017

On September 6, the Court of Justice of the European Union ("CJEU") set aside General Court's 2014 *Intel* judgment, upholding a European Commission (the "Commission") decision fining Intel €1.06 billion for abuse of dominance through exclusivity rebates.[1] The CJEU held that the General Court had erred in failing to examine all of Intel's arguments calling into question the anticompetitive effects of the arrangements under an 'as efficient competitor' analysis.[2] The CJEU referred the case back to the General Court, so that it may examine whether the Commission was correct to conclude that the rebates at issue were capable of restricting competition.

The CJEU Judgment qualifies the position taken by the General Court, which had treated exclusivity rebates as akin to a *per se* abuse. The CJEU makes clear that companies can dispute the anticompetitive effects of exclusivity rebates and requires the Commission to examine whether the rebates are, in fact, capable of restricting competition. In this respect, the CJEU Judgment is consistent with the Commission's Guidance Paper on Article 102 TFEU[3] and signals the CJEU's recognition that, even in respect of exclusivity rebates, the Commission is required to carry out an effects-based analysis in situations where dominant companies contend that their conduct could not in fact have foreclosed competition and adduce evidence substantiating that contention.

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[1] *Intel Corporation Inc v European Commission* ("General Court Judgment"), Case T-286/09 EU:T:2014:547.
[2] *Intel Corporation Inc v European Commission* ("CJEU Judgment"), Case C-413/14 P EU:C:2017:632.
[3] Guidance on the Commission's enforcement priorities in applying Article 82 [EC] to abusive exclusionary conduct by dominant undertakings, ("Guidance Paper"), O.J. 2009 C45/7.

Background

In 2009, the Commission imposed a €1.06 billion fine on Intel, a US-based microchip manufacturer, for having abused its dominant position on the worldwide market for x86 central processing units ("CPUs"), where Intel's market share was approximately 70%. The Commission found that Intel had acted unlawfully by granting rebates to four computer manufacturers (Dell, Lenovo, HP, and NEC) on condition that they purchased from Intel all, or almost all, of their x86 CPUs, and by awarding payments to a large electronics and desktop computer distributor, Media-Saturn, on condition that it sold only computers containing Intel's x86 CPUs.

Intel argued that, in order to establish an infringement, the Commission was legally obliged to carry out an "as efficient competitor" test (the "AEC Test") and show that Intel's conduct was capable of foreclosing as efficient competitors. The Commission took the view that the AEC Test was not indispensable for establishing an infringement, but only "*one possible way of showing whether Intel's rebates and payments were capable of causing or likely to cause anticompetitive foreclosure.*"[4] It nevertheless carried out an AEC analysis and found that a competitor that was just as efficient as Intel would have had to offer a price for its CPUs lower than its costs of producing those CPUs in order to compete—*i.e.*, Intel's conduct was capable of foreclosing an as-efficient competitor and therefore abusive.

Intel challenged the Commission's decision before the General Court, arguing that the AEC Test carried out by the Commission failed to establish the capability of the rebates at issue to foreclose as-efficient competitors. The General Court dismissed Intel's action in its entirety, concluding that exclusivity rebates by dominant companies are an abuse, regardless of the particular circumstances of the case. As a result, the General Court held that the Commission did not have to establish that Intel's conduct was capable of restricting competition. The General Court also ruled on jurisdictional and procedural points, finding that the Commission had jurisdiction to investigate Intel's agreements with Lenovo (even though they are both non-EU companies and the conduct took place abroad), and that the Commission did not have a duty to keep a record of an 'informal' interview it held during its investigation with a Dell executive.

On appeal, the CJEU set aside the General Court's judgment and confirmed the need to analyse Intel's criticisms of the Commission's approach to the AEC Test. In this memorandum, we analyse the CJEU Judgment and set out its most important implications.

Exclusive dealing and loyalty rebates[5]

Before the CJEU Judgment, there was considerable interest in whether the CJEU would endorse the formalistic approach taken by the General Court, which treated exclusivity rebates by dominant companies as abusive regardless of the circumstances, or whether it would assess Intel's conduct by reference to its capability to foreclose competitors from the market. The latter approach would be consistent with the Commission's Guidance and recent case law concerning pricing practices under Article 102.[6]

Exclusive dealing and loyalty rebates by a dominant company remain prima facie abusive

The CJEU repeated wholesale the passage in *Hoffmann-La Roche* stating that exclusive (or near-exclusive) dealings by a dominant company—whether contractually or in consideration of a rebate—are abusive under Article 102.[7] This means there is still a presumption of illegality when a dominant company enters into exclusive arrangements, regardless of the circumstances of the case.

[4] *Intel*, Case COMP/C-3/37.990, Commission decision of May 13, 2009, para. 925.

[5] Loyalty rebates are discounts conditional on the customer obtaining all or most of its requirements from the undertaking in a dominant position (*see* Hoffmann-La Roche v Commission ("Hoffman-La Roche"), Case C-85/76 EU:C:1979:36, para. 71). The Commission referred to this type of rebate as "fidelity rebates within the meaning of *Hoffmann-La Roche*", and the General Court referred to them as "exclusivity rebates". The CJEU reverted to the "loyalty rebate" terminology.

[6] *See, e.g., See* Post Danmark v Konkurrencerådet ("Post Danmark I"), Case C-209/10 EU:C:2012:172

[7] CJEU Judgment, para. 137

If a dominant firm submits evidence that the relevant conduct is not capable of restricting competition, the Commission must assess the circumstances to decide whether the conduct is abusive

After stating that exclusivity arrangements are *prima facie* abusive, the CJEU goes on to clarify that, where the dominant undertaking produces supporting evidence during the Commission's investigation that its conduct is not 'capable' of restricting competition, the Commission must examine the evidence to decide whether the conduct was capable of producing anticompetitive effects. This examination must cover all relevant circumstances. The CJEU listed the following (non-exhaustive) elements that the Commission must take into account:

- 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 in question, their duration, and their amount; and
- The possible existence of a strategy aiming to exclude from the market competitors that are at least as efficient as the dominant undertaking.

The CJEU thus took a nuanced approach to the allocation of the legal and evidential burdens in this type of investigation. If the relevant conduct is considered "by nature" abusive, as is the case with exclusivity rebates, there is a presumption of illegality. But, it is then open to the dominant company to rebut this presumption. The CJEU provides little guidance on the extent to which the dominant undertaking needs to substantiate its defence in order to rebut the presumption, saying only that a defendant has to 'submit' supporting evidence that its conduct is not capable of restricting competition. Accordingly, while it may not be enough for the dominant company merely to assert that its conduct is not capable of restricting competition, it is arguably enough for it to submit *prima facie* evidence showing there are good reasons to doubt the presumption of exclusionary effects in a particular case.

If the dominant undertaking substantiates its position, it is then for the Commission to prove, based on a review of all relevant circumstances, that the rebates are in fact capable of restricting competition.

A decline in the position of competitors is not sufficient for a finding of abuse

The CJEU also reaffirms the principle established in *Post Danmark I* that a mere decline in the fortunes of competitors, or even their exclusion, is not sufficient for a finding an abuse: "*Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient.*"[8] The CJEU therefore confirms the relevance of the AEC Test laid out in the Commission's Article 102 Guidance Paper for analysing pricing practices.

The CJEU did not say that the Commission must apply the AEC Test in every case. A dominant company may be able to establish lack of anticompetitive effects through other means, such as showing that a loyalty rebate covered only a small share of the market. But if a dominant company submits enough evidence that its conduct had no anticompetitive effect, the Commission may have to conduct a full AEC Test in order to counter the company's position. As the Advocate-General noted in *Intel*, if other circumstances "*do not unequivocally support a finding of an effect on competition…the AEC test cannot simply be ignored as an irrelevant circumstance*".[9] Some commentators have argued that the AEC Test represents an unreasonably high bar for the Commission. In *Intel*, however, the Commission in fact applied an AEC Test, and there is no reason why it could not do so in other cases, too.

Other considerations

A number of other considerations follow from the CJEU Judgment. First, the CJEU has brought greater consistency to the treatment of exclusivity in vertical agreements under Articles 101 and 102. Under Article 101, where the supplier's and buyer's market

[8] CJEU Judgment, para. 134.
[9] Opinion of Advocate General Wahl in Intel Corporation Inc v European Commission ("AG Wahl Opinion"), Case C-413/14 P, para. 169.

shares do not exceed 30% of the relevant market,[10] an exclusive or near-exclusive distribution agreement[11] is presumed to be legal,[12] so long as the non-competition provision does not last longer than five years.[13] After the 30% threshold is exceeded, a careful market analysis must be adopted to determine whether the effect of the exclusive arrangement is to restrict competition.[14]

Under the General Court's *Intel* judgment, however, an exclusivity agreement or loyalty rebate was automatically unlawful for dominant suppliers, without the need to carry out a careful market analysis. In practice, this meant that suppliers with more than a 50% market share—where there is a rebuttable presumption of dominance[15]—were at risk of having their exclusivity arrangements with distributors assessed differently under Articles 101 and 102. The CJEU Judgment has resolved this inconsistency.

Second, the CJEU has reconciled important differences in the analysis of exclusivity rebates and predatory pricing practices under Article 102. Under a long line of case law,[16] the legality of a dominant company's pricing strategy depends on its relationship to costs. Pricing above total costs is generally presumptively lawful, and pricing below incremental (or variable) costs[17] is presumptively unlawful.[18] Anything in-between is unlawful only where it is part of an exclusionary plan to eliminate a competitor that may be 'as efficient' as the dominant company.[19] The CJEU has now said that, when considering whether exclusivity arrangements are capable of restricting competition under Article 102, the Commission "*is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.*"[20] The CJEU Judgment also makes several references to *Post Danmark I*, a case concerning a pricing abuse, in its analysis of exclusionary arrangements.[21] Although the CJEU did not explicitly state that the framework for analysing predatory pricing should be applied to the analysis of loyalty rebates, the language in the CJEU Judgment is a significant step in that direction.

Third, the CJEU Judgment aligns certain aspects of the analysis of 'by object' restrictions under Article 101 and '*per se*' abuses under Article 102. Under Article 101, it has long been possible, at least in theory, to show that a presumed 'by object' infringement falls outside of Article 101 if it is not 'capable' of restricting competition, in light of the content, context, and objective of the conduct.[22] Until now, the same was not possible in the context of exclusivity arrangements under Article 102. The CJEU has gone some way in resolving this inconsistency, and the Commission must now take 'all the circumstances' into account also in the case of exclusivity agreements entered into by dominant companies (if the dominant firm raises this point).

Finally, the CJEU unfortunately did not clarify the meaning of 'capability'. In order to determine whether the dominant company's conduct falls within Article 102, the Commission must establish whether it is 'capable' of restricting competition or

10 Where the parties' market shares do not exceed 15%, the agreement will fall outside of Article 101 altogether. *See* Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, ("De Minimis Notice"), O.J. 2014 C291/01.

11 This includes any obligation on the buyer to purchase from the supplier more than 80 % of the buyer's total needs. *See* Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, (Reg 330/2010), O.J. 2010 L102/1, art. 1(d).

12 *See* Reg 330/2010.

13 *See* Reg 330/2010.

14 *See Delimitis v Henninger Bräu*, Case C-234/89 EU:C:1991:91.

15 *AKZO v Commission* ("AKZO"), Case C-62/86 EU:C:1991:286.

16 *See* Post Danmark I; *See also Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09 EU:C:2011:83; *See also Deutsche Telekom v Commission*, Case C-280/08 P EU:C:2010:603.

17 The cost benchmark for markets with high fixed costs and continuous innovation is typically long-run average incremental costs, rather than variable costs.

18 *See* Post Danmark I.

19 *Ibid.*, para. 27. *See also* AKZO.

20 CJEU Judgment, para. 139

21 *See* CJEU Judgment, paras. 133–136 and 139.

22 *See Karen Murphy v Media Protection Services Ltd*, Case C-429/08, paras. 140 and 143. *See also Groupement des Cartes Bancaires v European Commission*, Case C-67/13 P EU:C:2014:2204, para. 69.

likely to restrict competition. There has been some debate as to whether the 'capability' and 'likelihood' thresholds are the same. AG Wahl took the view that the two terms designate "*one and the same compulsory step in an analysis seeking to determine whether the use of loyalty rebates amounts to an abuse of a dominant position*"[23] and that capability (and therefore likelihood) "*must be considerably more than a mere possibility that certain behavior may restrict competition.*"[24] The CJEU did not follow AG Wahl to bring greater clarity into this area. In practice, however, if the Commission must establish that a dominant company's conduct is capable of restricting competition, it will have to discharge its burden by showing that foreclosure is sufficiently likely.

Where exclusive dealing and loyalty rebates fall within Article 102, is it possible to justify them by reference to efficiency?

There was some debate as to whether the General Court's assertion that it is open to a dominant company to show that its conduct is objectively justified had any substance, particularly since the General Court held that the "*beneficial effects for competition*" of exclusivity conditions "*cannot be accepted*"[25] in the case of a market where a company is already dominant. The CJEU put that issue to rest, finding that "*it has to be determined whether the exclusionary effect…may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.*"[26]

Jurisdiction

One controversial aspect of AG Wahl's Opinion in *Intel* was his finding that the Commission lacked jurisdiction to apply Article 102 with respect to the abuses originating from the agreements between Intel and Lenovo.[27] Noting the tests set out in *Gencor*[28] and *Woodpulp,*[29] AG Wahl considered that two alternative criteria could be applied to assert jurisdiction: the criterion of 'implementation', based on the place in which the anticompetitive practices are implemented and the criterion of 'qualified effects', based on the foreseeable, immediate, and substantial effects of the conduct in the EU. AG Wahl concluded that neither test was satisfied in this case because (i) Intel did not 'implement' its conduct in the EU (it sold CPUs to a Chinese company for incorporation into computers manufactured in China and only limited the possibility of AMD selling CPUs in the Chinese market), and (ii) the General Court did not properly apply the 'qualified effects' test.

The Commission had jurisdiction to investigate Intel's agreements with Lenovo—entered into outside the EEA—because it was foreseeable that they would have an immediate and substantial effect in the EU

The CJEU held that the qualified effects test pursued the same objective as the implementation test, namely, to ensure that conduct adopted outside the EU, but liable to have anticompetitive effects within the EU, falls within the EC's jurisdiction. The CJEU agreed with the General Court's conclusion that Intel's strategy, taken as a whole, satisfied the qualified effects test. In particular, it found that it was foreseeable (in the sense that it was 'probable'[30]) that the agreements between Intel and Lenovo concerning CPUs for delivery in China would have an immediate effect in the EEA. Moreover, since Intel's conduct formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including the EEA, the General Court did not err in considering that Intel's conduct was capable of producing an immediate effect in the EEA.

The Court has therefore confirmed the existing 'effects' doctrine for asserting jurisdiction. EU competition law applies to conduct that takes place outside of the EU, provided it is foreseeable (probable) that it will have an immediate and substantial effect in the EU. As the CJEU points out,

[23] AG Wahl Opinion, para. 115
[24] *Ibid.*, para. 117.
[25] General Court Judgment, para. 89
[26] CJEU Judgment, para. 140.
[27] *See* AG Wahl Opinion, para. 327.
[28] *Gencor v Commission*, Case T-102/96 EU:T:1999:65.
[29] *Ahlström Osakeyhtiö and Others v Commission* ("Woodpulp"), Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 EU:C:1988:447.
[30] CJEU Judgment, para. 51

companies would otherwise have an easy means of evading EU competition law by entering into agreements elsewhere.

Rights of Access to File

In the course of its investigation, the Commission held an interview with a Dell executive (Mr. D1). The Commission did not place the indicative list of topics for the interview on the case file and did not take minutes of the interview. Intel claimed that its rights of defence were infringed because the Commission failed adequately to record the interview with Mr. D1, which could have contained exculpatory evidence. The General Court found that the Commission's interview with Mr. D1 was 'informal' and therefore did not trigger the Commission's duty to record the meeting.

The Commission must record, in a form of its choosing, any interview to gather information relating to the subject matter of an investigation

The CJEU has flatly contradicted the General Court's position, finding that "*there is nothing in the wording of [Article 19(1) of Regulation 1/2003] or in the objective that it pursues to suggest that the legislature intended to establish a distinction between two categories of interview relating to the subject matter of an investigation or to exclude certain of those interviews from the scope of that provision*."[31] This is consistent with AG Wahl's opinion. It is now clear that, where the Commission decides to conduct any type of interview, it cannot omit to record the substance of that interview.

An infringement of the right of access to an interview record will not be enough to annul a decision if the operative part of that decision is otherwise well-founded

Intel argued that the Commission's meeting with Mr. D1 could have contained exculpatory material and, therefore, the failure to provide Intel with an adequate record of the meeting meant that Intel's rights of defence had been infringed and the Commission's decision should be annulled. The CJEU disagreed. It noted that the Commission did not rely on the interview for inculpatory evidence, and that there was adequate evidence of the infringement other than the interview. With or without the interview record, therefore, the outcome of the investigation would have been the same.

As to Intel's argument that the interview could have revealed exculpatory evidence, the CJEU found that it was for Intel to show (i) that it did not have access to certain exculpatory evidence, and (ii) that it could have used that evidence for its defence. The CJEU found that Intel should have been in a position to satisfy these criteria, given that it received an internal note of the meeting drawn up by the Commission, and a follow-up document containing Dell's written responses to the oral questions put to Mr. D1 during interview. But Intel did not take the opportunity to call Mr. D1 as a witness before the General Court and did not even attempt to contact Mr. D1 to confirm whether he had provided any exculpatory evidence. As a result, any infringement of Intel's rights to access the Commission's file did not vitiate the administrative procedure.

Conclusion

The CJEU Judgment corrects the General Court's judgment, which treated exclusivity rebates as akin to a *per se* abuse. This amounted to a legal shortcut that allowed the Commission and the Courts to find an abuse based on the mere form of the conduct (*i.e.*, an exclusivity rebate), rather than its effects. The CJEU has made it clear that, where the undertaking submits evidence that exclusive arrangements are not capable of restricting competition, a more thorough analysis is required in order to find a competition law infringement.

In practical terms, however, exclusivity rebates still carry significant legal risks. The CJEU confirmed that it is possible for a dominant company to show that these arrangements are not capable of restricting competition, but it will require overcoming a presumption of illegality. Even then, the Commission may be able to establish anticompetitive effects based on a full analysis of all relevant circumstances.

The CJEU Judgment also confirms that EU competition law will apply to conduct that takes place outside of the EU, provided it is foreseeable that it will have an effect in the EU, and that the Commission must record the substance of any

[31] CJEU Judgment, para. 87.

interviews it carries out in the course of an investigation.

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