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Moore's Law or Murphy's Law? Intel and the reform of the EU abuse of dominance rules

On 6 September 2017, the Court of Justice of the European Union (CJEU) published its widely anticipated judgment on the *Intel* case. It set aside an earlier General Court ruling that upheld the European Commission's previous €1.06bn fine on Intel for abuse of dominance in the chip market. The judgment confirms the importance of analysing economic effects in cases involving exclusivity rebates to customers

Moore's Law (in layman's terms) states that the processing power of computers doubles every two years. Murphy's Law states that anything that can go wrong will go wrong. The process of reform of the EU rules on abuse of dominance, which the Commission commenced more than a decade ago, falls somewhere in between the two. The number of court judgments on the topic of abuse of dominance has grown in recent years (although it has not quite doubled), but these judgments have not all moved in the same direction: some have supported the Commission's aim to give more prominence to the analysis of economic effects, but others have undermined it. No case illustrates this better than the one concerning the exclusivity rebates offered by Intel, the chip-maker co-founded by Gordon Moore, who came up with the insight behind Moore's Law.

Article 102 of the Treaty on the Functioning of the European Union (TFEU) and its national equivalents prohibit the abuse of a dominant position. In the past, EU case law tended to follow a form-based approach: first determine dominance; then assess the form of the conduct. Once a company was found to be dominant, its 'special responsibility'[1] not to impair competition meant that it could not engage in certain forms of behaviour, such as pricing below variable cost, tying products,[2] or offering loyalty rebates. Little consideration was given to the likely effects of these practices on competition and consumer welfare in a given case.

In a 2008 guidance document, the result of several years of consultation, the Commission sought to introduce a more effects-based approach.[3] This focused on the effects of the behaviour on competition and consumers. If a particular business practice is unlikely to foreclose competition in a significant part of the market, or if it generates efficiencies that benefit consumers, an effects-based approach suggests that intervention may not be required, even if individual competitors are harmed by the practice.

What followed was a series of Commission cases and EU court judgments that ranged from accepting an effects-based approach (e.g. the Court of Justice's *Post Danmark I* judgment, 2012[4])—to completely rejecting effects analysis (e.g. the General Court in *Intel*, 2014[5])—to leaving it somewhat ambiguous (e.g. the Court of Justice in *Post Danmark II*, 2015[6]).

The 2014 *Intel* judgment seemed particularly hostile to the Commission's reform efforts. Intel had long been the dominant computer processor chip-maker, with more than 70% of the global market. In its 2009 decision, the Commission had carried out a detailed assessment of the effects of Intel's rebates to computer manufacturers such as Dell, NEC and Lenovo. In line with its 2008 guidance, the Commission assessed whether an as-efficient competitor would be able to match these rebates, and concluded that it would not (hence finding an abuse on an effects basis). However, although it upheld the Commission's decision, the General Court held that the Commission's analysis of effects was unnecessary, stating that exclusivity rebates granted by a dominant undertaking are by their very nature capable of restricting competition, so a form-based approach was sufficient to establish an abuse.

The laws of pendulum motion

The *Intel* case has since taken a dramatically different turn. The Opinion of Advocate General (AG) Nils Wahl issued in October 2016 already provided a damning verdict on the General Court's 2014 judgment.[7] The CJEU confirmed

this in its September 2017 ruling, setting aside the 2014 judgment and referring the case back to the General Court.[8] (This also means that the last word on this case has not yet been spoken.)

In essence, the CJEU calls for an effects-based approach to rebate cases under Article 102. It states from the outset that:

> Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[9]

Some of the rebates offered by Intel on its chips to various computer manufacturers were conditional on the manufacturer obtaining all of its chips from Intel—this was the case for Dell, and for Lenovo's notebooks. Others were conditional on the manufacturer obtaining a certain percentage of its Central Processing Units (CPUs) from Intel—95% for HP's corporate desktops, and 80% for NEC's PCs. Such rebates made it harder for Intel's rivals, the largest one being AMD, to gain market share.

The General Court considered such exclusivity rebates as anticompetitive by nature, and therefore rejected the need for an assessment of the broader circumstances and effects of the rebate schemes. It rejected the Commission's effects-based test (notwithstanding the fact that this test also reached the conclusion that Intel's conduct was anticompetitive, since efficient competitors to Intel were unable to match the rebates). The CJEU disagreed with this rejection of the as-efficient competitor test, thus swinging the pendulum in the Article 102 debate once more. Why was this?

Laws of economics?

A form-based approach to abuse of dominance presumes that exclusivity rebates are, by their very nature, capable of restricting competition. In his 2016 Opinion, AG Wahl questioned the reliance on the nature of the rebates in concluding that they are abusive:

> Experience and economic analysis do not unequivocally suggest that loyalty rebates are, as a rule, harmful or anticompetitive, even when offered by dominant undertakings. That is because rebates enhance rivalry, the very essence of competition.[10]

AG Wahl further considered that, while evidence of actual effects does not need to be presented, the concept of 'capable of restricting competition' cannot merely be hypothetical or theoretically possible. He preferred the term 'likelihood of anticompetitive effects', which must be considerably more than a mere possibility that certain behaviour may restrict competition. This opened the door to an effects-based approach:

> the assessment of all the circumstances under Article 102 TFEU involves examining the context of the impugned conduct to ascertain whether it can be confirmed to have an anticompetitive effect. If any of the circumstances thus examined casts doubt on the anticompetitive nature of the behaviour, a more thorough effects analysis becomes necessary.[11]

The CJEU considers that, where the company under investigation (here, Intel) provides evidence that its conduct was not capable of restricting competition, the competition authority (here, the European Commission) is required to probe deeper into the economic context and the effects of the rebates. This includes:

- the extent of the company's dominant position in the relevant market;
- the share of the market covered by the challenged practice;
- the conditions and arrangements for granting the rebates, their duration and their amount;
- the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant company.[12]

This position of the CJEU makes economic sense. Market power is a matter of degree. A company with a near monopoly has a greater ability to foreclose competitors than a company with a 50% market share, and yet both may be considered dominant under competition law criteria. Intel, with its long-standing market position and 70% average market share, probably falls between the two. The market coverage of the rebates in question also matters significantly for the assessment of competitive effects. Intel's rebates covered, on average, only around 14% of total sales in the market throughout the relevant period. AG Wahl noted that this part of the effects analysis was 'by no means an arithmetic exercise', but that 14% coverage could not rule out that the rebates in question did not have anticompetitive effects.[13]

Another important factor in the effects analysis is the duration of the arrangements between Intel and its customers. A long overall duration of the arrangement can point to a loyalty-inducing effect. However, as noted by AG Wahl, if a customer chooses to stay with the dominant undertaking, it cannot simply be assumed that this choice results from abusive behaviour:

> where the customer has the option of switching suppliers on a regular basis, even where that option has not been exercised, loyalty rebates will also enhance rivalry. Thus they can also have a pro-competitive effect.[14]

The CJEU recognises that rebate systems may also have efficiency advantages that might outweigh the

exclusionary effects, and that such effects must be part of the assessment:

> 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…That 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.[15]

Concluding remarks

So the pendulum in Article 102 on abuse of dominance has swung again towards an effects-based approach. The CJEU has accepted the importance of economic criteria such as the degree of dominance, market coverage, and the duration of the practice, despite the absence of hard-and-fast rules when such criteria are applied and thresholds met (thus, critics say, leading to a degree of legal uncertainty). The CJEU has also confirmed the relevance of the as-efficient competitor test in rebate cases, rejecting the simple reliance on the nature of the rebates in assessing them.

A similar emphasis on effects analysis has been seen in Article 101 on restrictive agreements. The CJEU's *Cartes Bancaires* ruling of 2014 placed a limit on the type of agreements that could be prohibited 'by object' (per se), instead focusing on requiring an assessment of the context and effects of the agreement.[16] In *Intel*, the CJEU is therefore to some extent aligning the enforcement approach in 101 and 102 cases when it comes to practices that are prohibited 'by object'. Although there is a presumption of harm, this presumption can be rebutted if the accused party shows that the practices are not capable of having anticompetitive effects.

However, given the developments in case law over the past ten years, which resemble a pendulum more than a straight-line development, it seems uncertain where the rules of abuse of dominance ultimately end up. Ongoing cases in Europe are likely to become tests of this new doctrine (including Qualcomm, Google, and even pay-for-delay cases). The next word in the *Intel* saga will again, however, come from the General Court, and even that may not be the last!

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[1] Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461 (*Michelin I*).

[2] The sale of a product conditional on the buyer also purchasing a different product from the same supplier.

[3] European Commission (2008), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', December.

[4] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, judgment of 27 March 2012 (*Post Danmark I*).

[5] Case T-286/09 *Intel Corp v Commission*, judgment of 12 June 2014.

[6] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, judgment of 6 October 2015 (*Post Danmark II*). See also Oxera (2015), 'The *Post Danmark II* judgment: effects analysis in abuse of dominance cases', *Agenda*, October, https://www.oxera.com/Latest-Thinking/Agenda/2015/The-Post-Danmark-II-judgment-effects-analysis-in-a.aspx.

[7] Case C-413/14 P, *Intel Corporation Inc. v European Commission*, Opinion of AG Wahl, 20 October 2016. See also Oxera (2016), 'The latest intel from Luxembourg: an Advocate General prefers effects analysis in abuse cases', *Agenda*, November, https://www.oxera.com/Latest-Thinking/Agenda/2016/The-latest-intel-from-Luxembourg-an-Advocate-Gener.aspx.

[8] Case C-413/14 P, *Intel Corporation Inc. v European Commission*, Judgment of the Court, 6 September 2017.

[9] CJEU Judgment, para. 136.

[10] Opinion of AG Wahl, para. 90.

[11] Opinion of AG Wahl, para. 135.

[12] CJEU Judgment, para. 139.

[13] Opinion of AG Wahl, para. 141.

[14] Opinion of AG Wahl, para. 156.

[15] CJEU Judgment, para. 140.

[16] Case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission*, Judgment of 11 September 2014. AG Wahl had also delivered an Opinion in this case. See also Oxera (2014), 'From sports bras to cigarettes: economic analysis of anticompetitive agreements', *Agenda*, September, https://www.oxera.com/Latest-Thinking/Agenda/2014/From-sports-bras-to-cigarettes-economic-analysis-o.aspx.