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THE JUDGMENT OF THE GENERAL COURT IN *INTEL*

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1. INTRODUCTION

In recent years, competition enforcement has integrated economic analysis in many policy fields; however, consensus is still far from being reached regarding the treatment of exclusivity rebates. The General Court of the European Union[1] has recently upheld the European Commission's[2] decision ascertaining Intel's infringement of article 102 of the Treaty on the Functioning of the European Union in relation to its exclusivity rebates. In what has been considered a first test for a possible shift of the case-law towards an effects-based assessment of rebates, the Court has, however, confirmed its established formalistic approach, ruling that "*exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition*"[3]. After a brief description of the Commission's decision, the present contribution focuses on the General Court's judgment, highlighting the main arguments put forward for considering unnecessary the "as-efficient competitor test" to assess possible foreclosure related to exclusivity rebates. It concludes with some remarks on the need to consider a more economic approach, such as the one provided by the "as efficient competitor test", as a necessary, though not sufficient, element to distinguish between legitimate and abusive pricing behaviour by dominant players.

2. THE COMMISSION'S DECISION

The Commission found that Intel held a dominant position in the worldwide market for processors, which are a key component of any computer. The rebates awarded to four major computer

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[1] Judgment of 12 June 2014 in Case T-286/09 "*Intel v European Commission*".

[2] Decision of 13 May 2009 in Case COMP/C-3/37.990 "*Intel*".

[3] Note 1 above, par. 85.

manufacturers, which was conditional on their purchasing from Intel of all or almost all their supply needs, were considered fidelity rebates fulfilling the conditions of the Hoffmann-La Roche[4] case-law[5].

The Court of Justice has consistently ruled that it constitutes an abuse if a dominant undertaking "(...) *without tying the purchasers by a formal obligation, applies (…) a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements – whether the quantity of its purchases be large or small* (…)"[6].

In addition to demonstrating that the conditions set in traditional formalistic case-law were fulfilled[7], the Intel decision constitutes the first application by the European Commission of a detailed economic analysis relating to the effects of exclusivity rebates on competition, as outlined in the Commission's Guidance on enforcement priorities to abusive exclusionary conduct by dominant undertakings (henceforth also "Guidance")[8].

In the Guidance, enforcement priority in relation to exclusionary conduct focuses on foreclosure cases leading to consumer harm[9] and, in relation to conditional rebates, "(…) *the Commission intends to investigate (…) whether the rebate system is capable of hindering expansion or entry even by competitors that are equally efficient* (…)"[10]. Furthermore, the Commission stated that *"(...) what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is (…) the foreclosing effect of the rebate system on (actual or potential) competitors (..)*"[11], indicating that actual or potential restrictive effects should be assessed before considering rebates anti-competitive. If prices remain above the long-run average incremental costs of the dominant firm, an equally efficient competitor can normally compete profitably and rebates are generally not capable of foreclosure[12].

The Commission has clarified that the economic test defined in the Guidance should be considered a tool to set priorities in its future enforcement activity and not a new legal test, stating that the "*as-efficient competitor test*" provided in the Intel decision is in line with the guidelines set out in the

[4] Judgment of the Court of Justice of 13 February 1979 in Case 85/76 "*Hoffmann-La Roche v Commission*".

[5] Similarly, the payments awarded by Intel to Europe's largest PC retailer, which were conditional on selling exclusively Intel-based computers, have been considered equivalent in their effect to the conditional rebates granted to the computer manufacturers. Moreover, the second type of abuse of dominant position, contested by the European Commission in the Intel decision, which is not considered further in the present contribution, consisted in granting direct payments to three computer manufacturers to halt, delay or limit the launch of specific products incorporating chips from Intel's only rival AMD (so called "naked restrictions").

[6] Note 4 above, par. 89.

[7] Note 2 above, par. 1001.

[8] Communication from the Commission of 24 February 2009 – "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*".

[9] Note 8 above, par. 19.

[10] Note 8 above, par. 41.

[11] Note 8 above, par. 40.

[12] Note 8 above, par. 43.

Guidance[13], "*although not indispensable for finding an infringement under Article 82 of the Treaty according to the case-law*"[14].

Intel's exclusivity rebates were found capable of anti-competitive foreclosure as, in order to compensate computer manufacturers for the loss of the conditional rebate if they switched their demand away from Intel, a rival would have had to price its processors below Intel's average avoidable costs.

The theory of harm developed by the Commission is based on the fact that an unavoidable trading partner such as Intel can use its economic power over the inelastic share of the demand of each customer – the share that cannot be challenged by a rival – as leverage to decrease prices on the contestable share of demand, resulting in the capability to foreclose efficient competitors[15].

All such individual abuses of competition vis-à-vis computer manufacturers and a retailer were considered part of a single strategy designed to foreclose AMD, Intel's only significant competitor.

The effects of these practices were considered complementary, in that they induced loyalty and significantly diminished competitors' ability to compete on the merits. Intel's anti-competitive conduct thereby resulted in a reduction of consumer choice[16] and in lower incentives to innovate[17].

3. THE GENERAL COURT'S JUDGMENT

The General Court's judgment confirmed the established, rather formalistic case-law and considered effects-based analysis, in relation to Intel's exclusivity rebates, irrelevant. The Court ruled that exclusivity rebates can distort competition even if an equally efficient competitor is able to recover its costs, as by their very nature they are inherently capable of making access more difficult.

The General Court pointed out, first of all, that quantity rebates, linked solely to purchase volumes, are generally considered not to have foreclosure effects as they tend to reflect gains in efficiency and economies of scale.

In contrast, fidelity or exclusivity rebates, if applied by a dominant undertaking, "*are incompatible with the objective of undistorted competition within the common market*" as they are by their very nature "*designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market*"[18], provided that there is no objective justification for granting them. Such rebates differ from a third

[13] Note 2 above, par. 916.

[14] Note 2 above, par. 925.

[15] Note 2 above, par. 1005 and 1612.

[16] Note 2 above, par. 1603.

[17] Note 2 above, par. 1614.

[18] Note 1 above, par. 77.

category, identified as one in which the granting of a financial incentive is not directly linked to exclusive supply but can still have a fidelity-building effect. Only in relation to the latter, it is necessary to consider all of the circumstances of the case to assess whether the rebates constitute an abuse of competition.

In this regard the General Court has re-affirmed the principle that, provided that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition, the Commission was not required to demonstrate the potential or actual foreclosure effect.

In relation to the potential foreclosure effects, and the relevance of the "*as-efficient competitor test*", the Court points out that the Commission is not required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis, but that "*in order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism*"[19].

The General Court observes that foreclosure occurs not only when market access is made impossible for competitors, but also when entry is made more difficult[20]. The "*as-efficient competitor test*" cannot rule out the possibility that market access, while not economically impossible, has been made more difficult for rivals[21]. Thus, even if an as-efficient competitor is able to recover its costs, a potential foreclosure effect – deriving from the use of the dominant player's economic power over the non-contestable share as leverage to secure also the contestable share of each customer's demand – cannot be excluded, making access to the market structurally more difficult[22].

Furthermore, when such leverage is possible, it is not necessary to analyse the actual effects of the rebates or to prove a causal link between rebates and their actual effects, extending the reasoning to the lack of a need to prove direct harm to consumers[23].

The Court goes on to conclude that "*it is apparent from the case-law that Article 82 EC is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure*"[24].

The Court also states that even if the Commission were to analyse rebates on a case-by-case basis, without considering exclusivity rebates offered by a dominant player in itself capable of restricting competition, it has demonstrated the capability to restrict competition according to the required legal

[19] Note 1 above, par. 145.

[20] Note 1 above, par. 88 and 149.

[21] Note 1 above, par. 150.

[22] Note 1 above, par. 93.

[23] Note 1 above, par. 104.

[24] Note 1 above, par. 105.

standard. Indeed, the granting of these rebates by "*an unavoidable trading partner, such as the applicant, provides at least an indication that it is capable of restricting competition*"[25].

In conclusion, in the Intel decision the Commission has taken a more economics-based approach to enforcing article 102, although "only" in addition to and not in substitution of its traditional formalistic approach. The General Court has, however, confirmed the case-law on exclusivity rebates, ruling that the demonstration of potential or actual anti-competitive effects is not necessary, as they remain illegal *per se*.

In this regard, the General Court also pointed out that enforcement under article 102 of the Treaty is not limited to infringements that cause direct consumer harm, but also aims to protect the wider competitive process[26].

In this context, however, a more economics-based approach may be useful in competition enforcement in order to distinguish legitimate pricing behaviour from behaviour which leads to foreclosure and consequent consumer harm. The Commission's Guidance, and its implementation in the Commission's Intel decision, can be considered a first step forward, relative to past practice, in this direction. The introduction of the effects-based approach is, indeed, helpful in discerning "(...) *competition on the merits, which has beneficial effects for consumers and should therefore be promoted, from competition that is liable to lead to anticompetitive foreclosure, i.e. foreclosure that is likely to harm consumers*"[27]. The "*as-efficient competitor test*" is a possible way to assess foreclosure and is based on the dominant firm's costs, as the purpose of the test is to protect only rivals that are as efficient as the dominant undertaking, in order to maintain productive efficiency.

In contrast, the current "*open-ended test does not tell us something useful about the conduct's competitive merits (or lack thereof)*"[28]. Furthermore, the General Court goes as far as to state that even if an efficient competitor could recover its costs, the potential foreclosure effect inherent in exclusivity rebates cannot be ruled out[29].

Another step forward would consist in focusing also on the relation between foreclosure and harm to consumers[30]. Despite some progress, because of the lack of a coherent theory of how the potential

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[25] Note 1 above, par. 178.

[26] This wider objective is, indeed confirmed in the annexes to the Treaty of Lisbon where it is stated that *"(…) the internal market (…) includes a system ensuring that competition is not distorted*" . Undistorted competition, in addition to focusing on consumer welfare, may include also, for example, "(...) *the right to compete on the merits, and equality of opportunity between economic operators*" (Wouter P.J. Wils, *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance*, forthcoming in World Competition, Volume 37, Issue 4, December 2014, p. 16).

[27] European Commission, *Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions*, Memo/08/761, 3 December 2008.

[28] Hans Zenger, *Intel and the future of article 102*, CRA Competition Memo, June 2014.

[29] Note 1 above, par. 149.

[30] Giulio Federico, *The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach*, Journal of European Competition Law & Practice, 2011, Vol. 2, No. 3.

exclusion of rivals can result in consumer harm, European competition law on exclusivity rebates is still considered to be guided by an "Ordoliberal" concern with promoting rivalry[31].

The efforts that have been made to modernise European Union competition enforcement in the direction of a more economics-based approach have still to be completed in relation to article 102 of the Treaty, especially with regard to exclusivity rebates, which continue to be considered as illegal *per se*.

[31] Philip Marsden, *Some outstanding issues from the European Commission's Guidance on Article 82: Not-so-faint echoes of Ordoliberalism*, in *Competition Law and the Enforcement of Article 82*, Etro & Kokkoris, Oxford University Press, December 2010.