

European Court of Justice endorses effects-based approach to Article 102

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The European Court of Justice has delivered its much anticipated judgment in the case of *Intel v Commission*,¹ rejecting the controversial finding of the General Court that exclusivity rebates are per se abuses of dominance. The judgment provides welcome clarity for dominant firms, applying an effects-based approach for all types of rebates and removing the formalistic exception that the European Commission and General Court applied to exclusivity rebates. The judgment also clarifies that the Commission must record interviews it undertakes during its antitrust investigations and settles a long-running question about the territorial scope of the Commission's jurisdiction.

In 2009 the Commission fined Intel €1.06 billion for using exclusivity rebates and other illegal practices designed to exclude competitors from the market for x86 central processing units (CPUs). Intel appealed the Commission's decision to the General Court (GC) but the GC dismissed the appeal in 2014. Intel then brought a further appeal to the European Court of Justice (ECJ). Following on from Advocate General Wahl's opinion (AGO) in 2016, which rejected the majority of the GC's findings,² the ECJ has today set aside the GC's judgment and referred the case back to the GC.

Exclusivity rebates are not automatic infringements of Article 102

The GC had ruled that rebates which are conditional on a customer obtaining all or most of its requirements from a dominant firm (exclusivity rebates) are per se (automatic) abuses of dominance contrary to Article 102 of the Treaty on the Functioning of the European Union (TFEU) and that it is not necessary for the Commission to consider whether the rebates have anti-competitive effects in order to reach a finding of infringement.

The ECJ rejects this approach ruling that where the dominant firm submits evidence that its conduct was not capable of excluding competitors the Commission must analyse the effects of the conduct. In particular the Commission must analyse "*the extent of the undertaking's dominant position ..., the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also [re]quired 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*".³

The ECJ also confirms the importance of such effects-based analysis with regards to efficiency defences for exclusivity rebates. The GC's ruling that exclusivity rebates were effectively per se abuses of Article 102 TFEU had left little room in practice for dominant firms to argue that their rebates were nevertheless

¹ Case C-413/14P *Intel v Commission*, judgment of 6 September 2017.

² For an analysis of the AGO, see Slaughter and May's [Client Briefing](#) of October 2016.

³ *Intel*, para 139.

justified on the basis of efficiencies. The ECJ is clear in today's judgment that an effects-based analysis is a necessary precursor to assessing whether the efficiency defence is available: "*The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within ... Article 102 TFEU, may be objectively justified. 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*".⁴

Because of its ruling that exclusivity rebates were automatic infringements of Article 102 TFEU the GC did not consider all of Intel's arguments regarding the Commission's alternative analysis of the effects of the rebates on competition. The ECJ has sent this aspect of the case back to the GC for reconsideration.

The Commission must record interviews relating to the subject matter of an investigation

The GC had ruled that the Commission was only required to record "*formal*" interviews. The ECJ has today rejected the GC's distinction between "*formal*" and "*informal*" interviews and made clear that the Commission must record any interview it conducts for the purpose of collecting information relating to the subject matter of an investigation.

This clarification is a pyrrhic victory for Intel, however, as the ECJ goes on to set a high bar to establish that the Commission's procedural breach provides sufficient basis for annulling the Commission's decision. A firm seeking to rely on non-disclosure must show that it did not have access to exculpatory evidence and that it could have used such evidence for its defence. The ECJ found that Intel had failed to do so.

The Commission has jurisdiction over conduct that has an effect in the EEA

In today's judgment the ECJ also finally recognises that the Commission has jurisdiction to apply EU competition law not only against conduct which is implemented in the EEA but also where it is "*foreseeable*" that the conduct will have an "*immediate and substantial effect*" in the EEA. Although jurisdiction based on so-called "qualified effects" has long been asserted by the Commission, the ECJ has never previously expressly endorsed it (despite being urged to do so by several Advocates General over the years). Intel's "*overall strategy*" to exclude its competitor was relevant to give the Commission jurisdiction over Intel's arrangements concerning sales of CPUs to a Chinese manufacturer outside the EEA.

⁴ Ibid, para 140.

SLAUGHTER AND MAY

Comment

The ECJ's ruling that the Commission must consider whether exclusivity rebates are capable of producing anti-competitive effects is welcome confirmation that the EU antitrust rules seek to sanction practices based on their effect on competition rather than their form. The judgment is good news for dominant companies doing business in the EU as it confirms that the Commission must, in practice, conduct an analysis of competitive effects in order to establish an infringement of Article 102 TFEU.

One aspect of the debate surrounding the Intel case in which the ECJ did not engage is what "capability" to restrict competition means in these circumstances. While the law is clear that it is not necessary that there is an actual effect on competition, previous case law suggests that anti-competitive effects must be "likely" in order for an infringement of Article 102 TFEU to be established.



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