AG WAHL IN INTEL APPEAL OPTS FOR MORE EFFECTS-BASED APPROACH ON REBATES AND PROPOSES ANNULMENT OF GENERAL COURT'S INTEL JUDGMENT

20 October 2016 | London
Legal Briefings

In Intel's appeal against the General Court's judgement of June 2014 (which upheld the Commission's decision that Intel abused its dominant position by virtue of operating exclusivity rebate schemes – see here for our e-bulletin on the judgment), Advocate General Wahl recommends that the Court of Justice (CJEU) should set aside the ruling and refer the case back for the General Court to carry out a full assessment of the actual or potential effect on competition of Intel's conduct. According to Advocate General Wahl the General Court was wrong to conclude that the rebates operated by Intel were inherently anticompetitive and that it was therefore not necessary to consider the circumstances of the case in order to determine whether the conduct was capable of restricting competition. An analysis of the circumstances of the case is necessary to ensure that the abuse of dominance infringement is established to the requisite legal standard. Failure to do so could result in a blanket prohibition for certain conduct, even in circumstances where that conduct is not capable of restricting competition, which may ultimately end up penalising pro-competitive conduct.

The Advocate General sees the case as an opportunity for the CJEU to clarify and refine its case law on abuse of dominance, in particular in respect of exclusivity rebates. The CJEU is not bound by the Opinion, but should it decide to follow its approach, it will result in greater guidance and clarity for the assessment of rebates under EU competition law, which has long proved to be a controversial area of competition law.

According to Advocate General Wahl the General Court was wrong to conclude that the rebates operated by Intel were inherently anticompetitive and that it was therefore not necessary to consider the circumstances of the case in order to determine whether the conduct was capable of restricting competition. An analysis of the circumstances of the case is necessary to ensure that the abuse of dominance infringement is established to the requisite legal standard. Failure to do so could result in a blanket prohibition for certain conduct, even in circumstances where that conduct is not capable of restricting competition, which may ultimately end up penalising pro-competitive conduct.

The Advocate General sees the case as an opportunity for the CJEU to clarify and refine its case law on abuse of dominance, in particular in respect of exclusivity rebates. The CJEU is not bound by the Opinion, but should it decide to follow its approach, it will result in greater guidance and clarity for the assessment of rebates under EU competition law, which has long proved to be a controversial area of competition law.

1. BACKGROUND

In May 2009 the EU Commission imposed a record fine of €1.06 billion on Intel for abusing its dominant position in the market for computer chips. The Commission found that, over a period of at least five years, Intel had tried to protect its 70% market share by offering anti-competitive rebates to incentivise computer manufacturers to buy all, or most of their computer chips from Intel. Intel appealed the Commission's decision, arguing that the Commission was wrong to find that the conditional rebates granted to its customers were abusive per se, that the Commission failed to meet the required standard of proof in its analysis of the evidence and challenging the level of the fine as manifestly disproportionate.

The General Court upheld the Commission's decision in its entirety, including on the level of the fine. In its judgment the General Court distinguishes between three types or rebates:

- Quantity rebates, which reflect cost savings from higher volumes and are presumed lawful
- Exclusivity rebates, which are conditional on the customer obtaining all or nearly all of its

requirements from the dominant company, and are presumed illegal in the absence of an objective justification

- Other loyalty inducing rebates, for which it is necessary to take into account the specific circumstances of the case in order to assess their effect on competition in the market

The General Court found that the rebates in question were exclusivity rebates which, when granted by a dominant company, are by their very nature capable of restricting competition and foreclosing competitors from the market. There was therefore no need to assess the circumstances of the case in order to demonstrate that the rebates did, actually or potentially, have the effect of foreclosing competitors from the market. Intel did also not try to justify its rebates on grounds of objective justification or efficiencies.

Intel appealed the ruling before the CJEU on the basis that the General Court had erred in law by concluding that Intel's rebates were inherently capable of restricting competition and that any assessment of the rebates should have taken into account a number of factors such as market coverage, duration, falling prices and lack of foreclosure.

2. THE ADVOCATE GENERAL'S OPINION

Advocate General Wahl argues that the General Court wrongly interpreted previous case law on exclusivity rebates. The General Court relied on a statement in the Hoffman-La-Roche case to the extent that rebates that are conditional on the customer purchasing all or most of its requirements from the dominant undertaking are presumed unlawful. Although the CJEU in that case did not mention the need to consider all the circumstances of the case when determining whether an abuse has been established to the requisite legal standard, its conclusion on the unlawfulness of the rebates in question was nevertheless based on a detailed analysis of the conditions surrounding the grant of the rebates and of the market concerned. In subsequent case law the CJEU has also consistently taken into account all the circumstances of the case in order to determine whether the conduct concerned amounts to an abuse of dominance under Article 102 TFEU. An abuse of dominance is never established in the abstract, but even in the case of presumed unlawful practices, the CJEU has consistently examined the legal and economic context of the conduct in question (paragraph 73).

According to Advocate General Wahl the case law only distinguishes between two, as opposed to three categories of rebates: volume based rebates which are presumed lawful and loyalty rebates which are presumed unlawful and are treated similarly to object restrictions under Article 101 TFEU, for which it is still necessary to examine the legal and economic context of the conduct in question in order to exclude any other plausible explanation for that conduct. In creating a 'super category' of rebates for which there is no need to consider all the circumstances of the case, the General Court in effect creates a prohibition based on the form of the conduct instead of its effects, ruling out any efficiency, objective justification or other explanation for the conduct.

In the alternative, the General Court had in fact proceeded to asses in detail whether the rebates offered by Intel were capable of restricting competition. The Advocate General nevertheless concludes that the General Court also erred in law in this alternative assessment because it failed to establish, on the basis of all the circumstances, that the rebates did in all likelihood have an anticompetitive foreclosure effect. Advocate General Wahl argues that any finding of capability to restrict competition must be more than a hypothetical or theoretical possibility. To avoid over-inclusion, the assessment of capability for the conduct to be unlawful must be understood as seeking to ascertain that its presumed restrictive effects are in fact confirmed. Absent such a confirmation, a fully-fledged analysis has to be performed (paragraph 120). The Advocate General goes on the set out a framework for such analysis, which should focus on market coverage, duration of the arrangement, performance of competitors and the 'as efficient competitor' test.

3. COMMENT

The Opinion is perhaps unexpected and is likely to stir a lively debate as to whether or not the CJEU should follow the Advocate General's recommendations. It will be seen as a victory by those who had hoped that the courts would move away from the traditional, form-based approach to rebate schemes, towards a more effects-based analysis more in line with the Commission's guidance on its enforcement priorities in applying Article 102 to abusive exclusionary conduct (Guidance Paper). Although in cases relating to pricing and margin squeeze the European courts have been moving towards a more effects based approach, supporting the 'as efficient competitor' test set out in the Guidance Paper, the General Court had dismissed a similar approach should be adopted for the assessment of rebates which it distinguishes from pricing practices. The Advocate General sees this distinction as unwarranted and argues that loyalty rebates, predatory pricing and margin squeeze all fall under the category of price based exclusion and should therefore be assessed on a similar basis.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

KYRIAKOS FOUNTOUKAKOS

ANDRÉ PRETORIUS
PARTNER, LONDON

KRISTIEN GEEURICKX

SERGIO SORINAS
PARTNER, PARIS

EMEA REGIONAL HEAD OF PRACTICE – COMPETITION, REGULATION AND TRADE, BRUSSELS
+44 7920 455 155
Kyriakos.Fountoukakos@hsf.com

+44 20 7466 2738
Andre.Pretorius@hsf.com

PROFESSIONAL SUPPORT LAWYER, LONDON
+44 20 7466 2544
Kristien.Geeurickx@hsf.com

+33 1 53 57 76 77
sergio.sorinas@hsf.com

HENAR GONZÁLEZ DURÁNTEZ
PARTNER, MADRID

+34 91 423 4016
Henar.Gonzalez@hsf.com

LEGAL NOTICE