EU COURT OF JUSTICE RULING IN INTEL APPEAL – SCOPE FOR DOMINANT COMPANIES TO JUSTIFY REBATE SCHEMES

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Legal Briefings – By **Kristien Geeurickx**

In its long awaited judgment on Intel's appeal against the General Court's ruling that its rebate scheme was inherently anticompetitive and that there was no need to consider the circumstances of the case, the Court of Justice of the European Union (CJEU) has today referred the case back to the General Court for it to examine the factual and economic evidence in the case in order to establish whether the rebates at issue were in fact capable of restricting competition.

The ruling will be seen as an important victory by advocates for a more effects-based approach to rebate schemes operated by dominant companies whose actions may have an effect on competition and trade in the EU. Although the CJEU confirms the existing case law under which such exclusivity rebate schemes will be presumed a restriction on competition under Article 102TFEU, the Court makes it clear that it is possible for a dominant company to rebut that presumption. Where supporting evidence is produced by the dominant company as to why its conduct is not capable of restricting competition, this needs to be taken into account in the assessment of the validity of the conduct. But rather than introducing a requirement for the competition authorities to demonstrate the anti-competitive effects of such conduct, the judgment makes it clear that the onus is on the companies involved to demonstrate that the conduct in question does not have such effects.

The CJEU ruling also provides welcome confirmation that the 'as efficient competitor test' (AEC test) set out in the Commission's Guidance Paper on Article 102 TFEU is relevant in the context of the assessment of loyalty rebate schemes. The General Court had dismissed that the AEC test should be adopted for the assessment of rebates, which it distinguished from pricing practices such as margin squeeze and predatory pricing.

Impact for businesses

Although the general principles remain the same, providing a useful baseline when planning a rebate scheme, the judgment sends a clear message that a company can put forward a defence showing that its pricing does not exclude equally efficient competitors in practice. This should give companies with strong market power more flexibility with their rebate schemes, although it will be more important than ever to consider the possible impact of those rebates on their competitors, in order to shore up a defence strategy if it is ever needed.

In terms of existing rebates cases and cases raising similar issues, going through the system at the Commission and national competition authorities, the judgment sends a clear message that the authorities cannot take a blanket 'per se' approach and will need to scrutinise companies' defences closely and if necessary explain why they do not alter their conclusions. This may lead to some cases being dropped if an authority is not that confident that its analysis will stand up to scrutiny under appeal. More generally the judgment indicates that companies can win appeals even in complex abuse cases, albeit that when the General Court re-considers the case on remittal the outcome, and the fine, for Intel may remain the same.

It is also worth noting that, rather than focusing on the different categories of rebates, the CJEU appears to take a more holistic approach to exclusivity conduct by dominant companies, which is welcome, as it makes it clear that ultimately the same analysis should apply to conduct that results in exclusivity, be it by virtue of rebates or as a result of other conduct or contractual arrangements.

Background to the case

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 anticompetitive 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 of 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's appeal

Intel appealed the General Court's 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 the circumstances of the case.

Intel criticised the General Court's analysis, "carried out for the sake of completeness" as to the capacity of the rebates to restrict competition in the circumstances of the case. Intel also challenged the General Court's dismissal of the relevance of the AEC test in the case and argued that, as the Commission itself had applied the test, the General Court should have examined Intel's arguments that the application of the test by the Commission was flawed and should in fact have led to the conclusion that the rebates at issue were not capable of restricting competition.

In October 2016 Advocate General Wahl's opinion in the case was published, in which he recommends that the 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 (see our e-bulletin here).

The Court's findings

The CJEU ruling starts with a reminder that it is not the purpose of Article 102 TFEU to prevent undertakings from acquiring, on their own merits, a dominant position on the market, nor does it seek to ensure that competitors less efficient than the dominant undertaking should remain on the market (Post Danmark case C-209/10). It is therefore not the case that every exclusionary effect is necessarily detrimental to competition, and competition on the merits may, by definition, lead to the departure from the market of competitors that are less efficient. But Article 102 TFEU does prohibit dominant companies from adopting (among other things) pricing practices that have an exclusionary effect on competitors that are considered as efficient as the dominant company.

Referring to Hoffmann-La Roche the CJEU confirms that exclusivity requirements under which customers have an obligation to obtain all or nearly all their requirements from the dominant undertaking, will typically amount to an abuse of dominance whether the quantity of purchases is large or small. But that case law also clarifies that, in the context of an infringement investigation, where the dominant company submits supporting evidence that its conduct was not capable of restricting competition and did not have the alleged foreclosure effects, the Commission is required to consider these arguments. The Commission should take into account factors such as the extent of the company's dominant position on the relevant market, the portion of the market covered by the practices under investigation, the characteristics of the rebates such as their duration, the amounts and whether the company operated a strategy aimed at excluding as efficient competitors from the market. According to the CJEU a similar analysis should be applied in assessing any objective justification for the conduct that is being put forward by the dominant company.

Where the Commission carries out this type of analysis in its decision, the General Court is required in any subsequent appeal to examine all the applicant's arguments which call into question the validity of the Commission's findings.

In its Intel decision, although the Commission concluded that the rebates at issue were by their very nature capable of restricting competition, it did nevertheless carry out a more detailed examination of the circumstances, including an assessment of the AEC test, which led it to conclude that an as efficient competitor would not have been able to compete with Intel's prices. In view of the importance of the AEC test to the Commission's decision, the CJEU held that the General Court should have considered Intel's arguments concerning the test.

The General Court did not attach any importance to the AEC test carried out by the Commission and failed to address Intel's arguments challenging the way in which the Commission had applied the test in its case. On that basis the CJEU set aside the General Court's ruling and referred the case back for the General Court for it to assess, on the basis of Intel's arguments and taking into account the factual and economic evidence, whether the rebates at issue were capable of restricting competition.

It remains open to the General Court to reach the same conclusion and uphold the Commission's decision and fine imposed on Intel, but it will need to review and assess the arguments put forward by Intel and explain in its ruling why they do (or do not) override the general presumption. It will now take at least a further two years until the case is resolved for Intel.

KEY CONTACTS

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

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