

Preiskel & Co Briefing on the EU Court of Justice judgment in *Intel*

8 September 2017

Executive summary

- The EU Court of Justice—the EU’s highest court—has handed down a judgment unexpectedly requiring its junior counterpart, the General Court, to revisit points in the case against Intel for allegedly anti-competitive rebates on computer processors.
- The case requires the General Court to revisit its analysis of the use of an additional test—known as the As Efficient Competitor Test (AECT)—that seeks to estimate efficiency direct in order to define the scope of rules, in contrast with a more rules-based approach that prevailed in earlier cases.
- Here, the EU Commission had applied the AECT, but the General Court found that it need not have done so. Intel challenged the way in which the test was applied—and the Court of Justice found error in not addressing these arguments, in the specific context of the Commission having chosen to apply the test in its investigation.
- Today’s case is terse and does little more than ask the General Court to revisit the point. Therefore, it sets few points of principle, other than requirements for procedural propriety in addressing relevant points when they are raised.
- The case contains a thimbleful of language, derived from the Advocate General’s earlier briefing to the court, that is sympathetic to the cause that competition law should not protect inefficiency. What that means in practice is likely to remain as controversial and unresolved as ever, but expect the language to be closely watched, especially in legal analysis of dominant pricing policies.

Introduction

The essence of competition might be discounting. If so, the *Intel* case addresses conduct that might be thought of as too much of a good thing. In a nutshell, the case turns on the scope for liability for discounting by a dominant company that promotes exclusivity. This thorny topic is not clear at the best of times, with divergent requirements under:

- **EU competition law**, with a contrast between the EU’s “Enforcement Priorities” and several litigated cases, old and new, which cast the problem in divergent language and apply different tests. Over the past five years, cases like *Tomra*, *Intel* and *Post Danmark* have stressed different aspects of the optimal approach to discounting law and thereby put a premium on careful and cogent analysis.
- **U.S. antitrust law**, which contains a long-standing and sharp Courts of Appeals circuit split on how to approach monopolization cases containing elements of pricing policies and exclusivity arrangements—and, following the Supreme Court’s denial of certiorari in the *ZF Meritor* case, this circuit split looks likely to remain unresolved for years to come.
- **UK competition law**, which has shown limited enforcement interest in this area. Very recently, the CMA issued a rare no-action decision in *Unilever* that strongly suggests that detailed evidence gathering will be favoured in deciding whether discounting is

problematic, limiting the scope for strict (“per se”) treatment of dominant discounts except where exclusivity arises.

Thus, recurrent issues in all three jurisdictions surround points of principle that can significantly affect pricing structures in industries with high levels of market concentration.

Expect significant attention to the judgment by all those expected to comply with, or benefit from, the underlying rules and their aim of preserving market access. This note suggests that, for all the fanfare, the judgment changes relatively little in itself – meaning that the General Court’s approach to discharging its duty to revisit the case yet has potential to change very important points.

Context

The Intel case stretches back almost two decades, at least to an initial complaint filed with the EU by Intel competitor Advanced Micro Devices in October 2000. After lengthy investigation, the Commission issued a EUR 1.06 billion fine in 2009, which remained its largest fine for abuse of dominance until Google was fined for discriminatory product placement earlier this year.

The core of the case against Intel is the allegation that it used rebates to encourage the exclusive use of Intel processors in computers, and thereby excluded rivals from this business. In high fixed cost technology industries, these strategies can be quite potent, as denying scale to a rival can undermine investment strategies, especially where large research and development funds are needed.

This fine was upheld in strident terms by the EU’s General Court, which is the first instance court reviewing Commission decisions. Today’s decision turns on the General Court’s decision not to address arguments about the AECT despite Intel having raised points about its use by the Commission.

The judgment doesn’t make any radical changes on interpretation of the law and while it referred an issue back to the General Court, it is not a major shift of position. In simple terms, it is more of a clarification of procedural fairness than a precedent about the meaning of the substance of the test with relation to loyalty rebates.

The issue with loyalty rebates—and the “As Efficient Competitor” test

The underlying problem is that loyalty rebates may be procompetitive, as where they increase the intensity of competition with another competitor. However, they could also be exclusionary of that competitor if they are designed to discourage switching, e.g. a requirement to take all units from a dominant company. The dividing line may be difficult to determine in each case, and where the defendant says that the rebates were pro-competitive the Commission must examine and test the likely truth and reliability of that argument. In the Intel case, the defence was that the rebate scheme would not exclude an “As Efficient Competitor” or AEC, hence was not exclusionary on an efficiency basis. The Commission did consider the AEC point, but arguably not enough.

The General Court found that the AEC analysis was not necessary, because in its judgment the agreements were anti-competitive regardless of AEC analysis, and so there was no need to investigate more than the capability of the effect on the market. Today’s decision from the Court of Justice found that the arguments raised by Intel needed to be addressed, and that the General Court was not right to back the Commission on the point in the absence of analysis of the points raised.

That said, there is some significant language on efficiency added by this judgment (in bold in the extracts below). This is likely to be read as moving the needle towards the position adopted by the Advocate General that antitrust law should take care not to penalize pro-competitive conduct. In principle that is a very fair point, but whether it requires the AEC is a highly contentious point, especially where the line between protecting competition and penalizing a pro-competitive discount is not clear. The references to efficiency here will be closely read, but it remains to be seen how far they alter practice in relation to rebates.

Relation to *Streetmap v. Google*

Interestingly, the judgment of Sir Peter Roth in the *Streetmap vs Google* case echoes the CJEU judgement in *Intel*, because Roth J was unhappy about making a finding of abuse where there was evidence of **capability** to affect the market, but perhaps less than compelling evidence of an **actual** effect on competition, according to his assessment of the facts. It is the first stand-alone abuse of dominance claim in the UK, and the leading case on abuse of dominance in the tech sector in the English Courts (and, for full disclosure, one in which this firm was active).

The approach of the *Streetmap* case to the treatment of facts and evidence of foreclosure rewards detailed analysis. In *Intel* the Advocate General briefed the court with his suggested approach. He reviewed the case law concerning the presumptive abusiveness of loyalty rebates, emphasising the role of context:

54. the Court has consistently taken into account ‘all the circumstances’ when determining whether the impugned conduct amounts to an abuse of a dominant position...

...

78. The analysis of context... aims to ascertain that it has been established, to the requisite legal standard, that an undertaking has abused its dominant position. Otherwise, conduct which on occasion is simply not capable of restricting competition would be caught by a blanket prohibition. Such a blanket prohibition would also risk catching and penalising pro-competitive conduct.

The Advocate General therefore concluded that contextual analysis is important, moving the needle (if not expressly requiring) detailed analysis of effects:

173. The General Court erred ... in finding that ‘exclusivity rebates’ constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position.

By contrast, today’s judgment sets out the same issue with markedly less emphasis on actual effects, but rather on procedure where the Commission has *already* decided to conduct an efficiencies-based analysis:

142. ... the Commission emphasised in the decision at issue that the rebates at issue were, by their very nature, capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an as efficient competitor test (‘AEC test’) were not necessary, **it nevertheless carried out an in-depth examination of the circumstances of the case in its decision**, which led it to conclude that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of foreclosing such a competitor. The AEC test therefore played an important role in the Commission’s

assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

Thus, the Court finds that the General Court was required to examine **all of Intel's arguments** concerning that test (such as, inter alia, the errors allegedly committed by the Commission in applying that test), which the General Court failed to do. The Court therefore sets aside the judgment of the General Court as a result of that failure in its analysis of whether the rebates at issue were capable of restricting competition.

Implications of today's decision

In principle, the law as it now stands is that an abuse of dominance must be accompanied by evidence of effect of exclusion or likely exclusion. This is consistent with the judgment in the *Streetmap* case, but the line of cases where evidence of an abuse giving rise to a potential effect or where the abuse is capable of having an effect is not, in our view needed in all cases and other cases are not expressly overridden. In most cases an effect needs to be shown, but it is important to remember that some cases can be imagined, such as the adoption of an intentionally exclusionary practice, which could be an abuse before evidence of harm has in fact taken place, and where evidence of **likely** harm will suffice.

An example would be the venerable *Sealink* case, where a new entrant sought and obtained interim relief from the Commission to enable it to access a port and enter the market for ferry services. (See *B&I* and *Port Di Genoa*.)

The Court accepted that certain types of restriction could by their very nature be restrictive of competition. It also accepted that where the Commission had investigated all the circumstances and where the Commission has examined the defence of AEC it must do so properly and fully address the defence arguments and evidence.

The issue in the case could be more procedural than substantive because the reasoning appears to be that when the Commission does an assessment of all the circumstances—and in doing so examines the AEC—it must take into account and examine the arguments of the defendant. That is hardly surprising given the rights of the defence and procedural propriety.

Today's judgment also expressly states that all the circumstances have to be examined every time in an Article 102 case. But that is potentially only every time the Commission is looking at pricing and rebate systems, not every type of abuse, and it remains to be seen how far this requirement will be followed elsewhere.

There would otherwise be an inconsistency with other cases such as *Telia Sonera*. Where new entrants cannot match incumbent efficiency in the short term, as may occur in telecoms, a different approach might be called for. Abuse was found in that case and the court suggested that entry and evidence of the costs of the entrant should be decided with reference to the reasonably efficient entrant at equivalent scale over time. Clearly, if incumbent telecoms players can act in ways that are only abusive if new entrants must be as efficient as the incumbent, then no entry would be possible.

It is worth revisiting the *Telia* language on effects for context here:

65. Where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU.

66. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice.

67. In the present case, it is for the referring court to examine whether the effect of TeliaSonera's pricing practice was likely to hinder the ability of competitors at least as efficient as itself to trade on the retail market for broadband connection services to end users.

...

76. The assessment of the economic justification for a pricing practice established by an undertaking in a dominant position which is capable of producing an exclusionary effect is to be made on the basis of all the circumstances of the case ... In that regard, it has to be determined whether the exclusionary effect arising from such a practice, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. **If the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as an abuse.**

It should be noted that the efficiency reference is present in the above language too – but, crucially, also a warning that a margin squeeze can be abusive even where the abuse fails. Thus, the efficiency reference might be thought of as a rider or health check requiring attention to context but does not, without more, amount to a requirement for effects, especially in those contexts where liability after the abuse has occurred is likely to be too late, e.g. where investment incentives are impaired. So, the court is requiring a balancing test that accounts for relevant factors – in which efficiency is one aspect of the analysis in the full context of potential harm from the alleged abuse.

Nonetheless, Google may also find its case strengthened by references to efficiency, since a central argument there relates to the balance struck between efficiency of product design, and the risks of exclusion of rivals. It is to be expected that Google will try to use the decision in any appeal of the recent Commission decision.

Unresolved questions / next steps

The Intel decision does not address the question of whether in a suitable case, perhaps not a rebate case, the Commission or court could simply make a decision that a type of practice is abusive because it is capable of having anti-competitive effects, and there is does not have to prove effect. Intentional exclusionary predation would be an example, where an injunction might be needed to restrain abuse before it has happened.

Today's judgment should not be used as authority for the proposition that abuse can only be found once the car has crashed and only after evidence of car crashing being caused by abusive dominant company: care is needed in that some conduct can, as a matter of principle, give rise to liability before the full effects of that conduct are seen. Indeed, the court quoted the importance of dominant company's special responsibility, and compliance in advance of abusive act is still required.

In all events a precautionary approach by authorities and claimants is to show exclusionary effect in as many cases as possible. In the normal course of private litigation this will be important in any event as a matter of proof of harm to competition or damages.

The operative parts of the judgment follow below.

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Extracts from today's judgment

134. 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 (see, inter alia, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 22 and the case-law cited).
- 135 However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see, inter alia, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 57, and of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23 and the case-law cited).
- 136 That is why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate (see, to that effect, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 25).**
- 137 In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty 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 — from the undertaking in a dominant position (see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 89).
- 138 However, that case-law must be further clarified in the case **where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.**
- 139 **In that case**, the Commission is **not only required to analyse**, first, the extent of the undertaking's dominant position on the relevant market and, secondly, 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 acquired 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 (see, by analogy, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29).

- 140 The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in 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 (judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 86). 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.
- 141 **If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.**
- 142 In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position (see, inter alia, paragraphs 925 and 1760 of that decision), **it nevertheless carried out an in-depth examination of those circumstances**, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test, which led it to conclude, in paragraphs 1574 and 1575 of that decision, that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.
- 143 It follows that, in the decision at issue, **the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.**
- 144 **In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.**
- 145 It held, however, in paragraphs 151 and 166 of the judgment under appeal, that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors, and that it was also not necessary to examine the question whether the alternative calculations proposed by Intel had been carried out correctly.
146. In its examination of the circumstances of the case, carried out for the sake of completeness, the General Court therefore attached no importance, in paragraphs 172 to 175 of the judgment under appeal, to the AEC test carried out by the Commission and, accordingly, did not address Intel's criticisms of that test.

147 Consequently, without it being necessary to rule on the second, third and sixth ground of appeal, **the judgment of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.**