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Intel in the Court of Justice. A more economic approach to exclusivity rebates.

In practice exclusivity rebates will only be an abuse if capable of restricting competition.

Exclusivity rebates are used in markets ranging from postal deliveries through ice cream to computer processors and are normally regarded as beneficial to consumers. However, when applied by dominant companies such rebates could potentially entrench an existing market position and have been penalised by European antitrust authorities as an "abuse of dominance". In a rare court defeat for the European Commission, the Court of Justice of the EU in its *Intel* judgment released on 6 September 2017 gives welcome comfort to companies with strong market positions, holding that it is not necessarily illegal for a dominant company to grant rebates conditional on exclusivity. The Court says that, provided the company can show evidence that the rebates are not capable of causing anti-competitive foreclosure, the Commission must analyse all the relevant market circumstances before finding an infringement.

In essence, the Court has taken its first steps down the road of requiring the Commission – and national authorities and courts in the EU – to undertake an analysis of the effects of exclusivity rebates before concluding that there has been an abuse of dominance. The previous approach was to presume exclusivity rebates were illegal. The judgment was issued by the fifteen-strong Grand Chamber of the Court, underlining the significance of its restatement of previous case law.

The ruling provides some important clarity to a debate that has been running for some time, as it brings the law on exclusivity rebates more closely into line with that on other types of pricing abuses. But the judgment will not be the last word on rebates, as it is in parts unclear, and it also leaves some important questions unanswered. Meanwhile, Intel's fight goes on as the Court of Justice has referred the case back to the first instance General Court for reconsideration of the facts.

The Court also confirmed that the Commission has jurisdiction to penalise agreements and practices that are implemented outside the EU but which have effects within the EU.

Intel's rebate system

In 2009 the Commission fined Intel a then-record €1.06bn for allegedly foreclosing its competitor AMD from the market for x86 CPU microprocessors (CPUs). Various abuses were found and those which eventually came before the Court of Justice consisted of granting rebates to computer manufacturers on condition that they purchase all, or almost all, their CPUs from Intel. The Commission held that the rebates were *per se* illegal, but also went on to discuss their market foreclosure effects.

On Intel's appeal, in 2014 the General Court, relying on its reading of earlier case law, upheld the fine and agreed that such exclusivity rebates were necessarily illegal, and that there was no need for the Commission to investigate whether there had been

market foreclosure. In an approach which the Court of Justice endorsed in its subsequent *Post Danmark II* judgment, the General Court categorised rebates into three groups:

- quantity rebates: normally legal;
- rebates conditional on exclusive or almost exclusive purchase: presumed illegal unless the company proves that they are objectively necessary or justified by efficiency benefits; and
- all other rebates: legality depends on "all the circumstances" ("third category rebates").

Intel's rebates were found to be of the second type and so there was no need to consider "all the circumstances" in order to prove anti-competitive foreclosure.

Intel in the Court of Justice

On Intel's further appeal, the Court of Justice has now set aside the General Court's judgment and referred the case back for further analysis. The Court of Justice cited the earlier case law that the General Court had relied on with approval, but it immediately went on to say that it "must be further clarified" that if a company "submits… on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects" then the Commission must analyse this evidence before it can find an infringement. This is essentially new law, with the Court following the Opinion of its Advocate General Wahl who had argued cogently in favour of this type of approach.

The Court helpfully lists the factors the Commission is required to consider which include the level of dominance, the share of the market affected, and the nature and duration of the rebates. Most notably it also refers to "the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking". This may be read as saying that intent is also relevant, but appears also to be significant in endorsing the use of the "as-efficient competitor" (AEC) test. The AEC test is a quantitative calculation to establish whether competitors who are similarly efficient as the dominant company could profitably match the dominant company's rebates. If such competitors could do so, then in principle the dominant company's rebates would not be abusive.

In this case the Commission had applied the AEC test in its decision and it played an important role in supporting the infringement finding against Intel. The Court of Justice found that the General Court's ruling contained errors of law, since it held that it was unnecessary to deal with Intel's arguments that the AEC test had been applied incorrectly. The Court therefore sent the case back to the General Court so that it can reconsider and rule on this point.

The unanswered questions concern the standard required to demonstrate that a rebate is "not capable" of causing anti-competitive foreclosure, and whether the dominant company's conduct has "the capacity to foreclose". These points will remain controversial and important, at least until the General Court's further ruling. Until then, dominant companies may take some comfort from the Advocate General's Opinion to the Court, which makes clear his view that capability means "considerably more than a mere possibility" and that "the fact that an exclusionary effect appears more likely than not is simply not enough". The test posited by the Advocate General is that the conduct must "in all likelihood" have an anti-competitive foreclosure effect.

Rebates strategy for dominant companies

Dominant companies are now assured that there is some scope for them to apply exclusivity rebates, whereas previously these were prohibited for all practical purposes. Given the important unanswered questions it remains to be seen how confident dominant companies will be in applying exclusivity-based rebates in practice.

More generally the Court of Justice's ruling helpfully reiterates that "not every exclusionary effect is detrimental to competition". Indeed, the Court goes out of its way to stress that competition on the merits may result in market exits by "competitors that are less efficient". Moreover, the judgment makes frequent reference to price competition, and to its previous judgment in *Post Danmark I*, which concerned pricing and endorsed the principle that EU abuse of dominance law is not designed to protect less efficient competitors. The *Intel* judgment is therefore a welcome indication that the European Courts are not only prepared to engage with economic analysis, including the use of the AEC test, in antitrust cases (and rebates cases in particular), but that they fully expect the Commission to undertake robust economic analysis. If the Commission's analysis falls short, the Courts will be prepared to strike down its decisions.

National competition authorities and courts also now have a clear message from the Court of Justice that exclusivity rebates cannot be presumed to be an abuse of dominance once evidence is put to them of an absence of anti-competitive foreclosure. The UK Competition and Markets Authority has already shown in August this year its appetite to adopt effects-based analysis when it issued a "no grounds for action" decision holding that certain of Unilever's rebate schemes were unlikely to have an exclusionary effect. The economic evidence required to prove an abuse of dominance in the growing field of antitrust litigation is also likely to be more stringent.

Abuse of dominance: beyond rebates

Case law provides relatively little guidance for dominant companies, partly because there are very few infringement

cases, only a few of which reach the Courts. Instead many abuse cases are closed informally in return for behavioural commitments. Just as importantly, the vast majority of infringement cases tend to concern dominant companies with extremely high market shares, former state monopolies or companies with special rights, so they do not necessarily provide good guidance for a company with say a 45 per cent market share. This rare judgment is therefore important as a contribution to the broader debate on the role of the prohibition of abuse of dominance. It confirms that the Court of Justice is prepared to adapt its case law and move, albeit cautiously, towards increased requirements for analysis of market effects and use of quantitative techniques.

Commentators will now closely watch the Commission's current investigations of Qualcomm and Google for indications of the effects of the *Intel* ruling on the standards of economic evidence the Commission will require to substantiate its decisions in abuse of dominance cases.

For further information on how to minimise antitrust risk in light of recent developments, please get in touch with a member of our antitrust, competition and trade group.