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The European Court of Justice's Judgment in Intel

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Today the Court of Justice of the EU (CJEU) issued its long-awaited judgment in *Intel Corporation Inc. v European Commission*. It sets aside the judgment of the General Court (GC) on the basis that the judges failed to assess the effects of the loyalty rebate schemes implemented by Intel on competition in the EEA. The CJEU refers the case back to the GC.

Background

The *Intel* case concerns the supply of central processing units (CPUs) to original equipment manufacturers (OEMs). Following a complaint lodged in 2000 by Advanced Micro Devices (AMD), the European Commission (Commission) investigated two types of conduct by Intel:

- Intel offered rebate schemes to four OEMs – Dell, Lenovo, HP and NEC – conditioned on them obtaining all or almost all of their requirements for x86 CPUs from Intel. In addition, Intel granted payments to one of its retailers, Media-Saturn-Holding (MSH), on the condition that it only sold computers containing Intel's chips.

- Intel made payments to HP, Acer and Lenovo on the condition that these OEMs postponed, cancelled or limited distribution of products using CPUs from AMD.

In 2009 , the Commission imposed a €1.06 billion fine on Intel for having abused its dominant position in the worldwide market for x86 CPUs between 2002 and 2007 by offering conditional rebates to OEMs and MSH, inducing their loyalty and thereby reducing competitors' ability to compete on the merits ("conditional rebates"). The Commission also found that Intel's direct payments to HP, Acer and Lenovo were aimed at preventing or delaying the launch of computers based on competing chips ("naked restrictions"). It concluded that this conduct was abusive under Article 102 of the Treaty on the Functioning of the European Union (TFEU), finding that each abuse was part of a single strategy aimed at foreclosing AMD from the market for x86 CPUs (such that they were part of a single infringement of Article 102 TFEU).

This Decision was upheld by a judgment of the GC in 2014. On 20 October 2016, AG Wahl issued an Opinion in which he recommended setting aside the 2014 judgment and referring the case back for

the GC to carry out an assessment of the actual or potential effect of Intel's conduct on competition. While the CJEU refers the case back to the GC, it does so on grounds that diverge from the approach of AG Wahl.

Review of rebate schemes taking into account "all the circumstances"

The key issue clarified in the *Intel* judgment is that it is possible for a dominant firm to rebut the presumption that a rebate scheme is 'capable' of restricting competition. Anticompetitive harm is presumed in exclusive dealing and loyalty rebate cases. As a result, where the entity that is alleged to have abused a dominant position produces evidence, the Commission must consider arguments made that the practice is not capable of having an effect on competition.

In its decision, the Commission considered that the exclusivity rebates offered by Intel were by their very nature capable of restricting competition. Nevertheless, it carried out an extensive analysis of the circumstances of the case, examining in particular whether these rebate were likely or capable to cause anticompetitive foreclosure, using the "as efficient competitor" (AEC) test. On appeal, the GC found that it is "*not necessary to show that* [exclusivity rebates] *are capable of restricting competition on a case by case basis in the light of the facts of the individual case*." It went on to state that "[e]*ven a positive AEC test result would not be capable of ruling out the potential foreclosure effect which is inherent*" in exclusivity rebates.

In his Opinion, AG Wahl suggested that the GC had "*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*", noting that the CJEU "*has consistently taken into account 'all the circumstances' in ascertaining whether the impugned conduct amounts to an abuse of a dominant position contrary to Article 102 TFEU.*"

The CJEU sets aside the judgment of the GC, finding that the GC failed to take into consideration Intel's arguments regarding the Commission's application of the AEC test. It goes on to clarify that a dominant undertaking may rebut the presumption that its rebate scheme is capable of restricting competition, particularly through foreclosure. The CJEU reiterates that Article 102 TFEU does not "*seek to ensure that competitors less efficient that the undertaking with the dominant position should remain on the market*" and that "[c]*ompetition 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.*"

The CJEU then confirms that the Commission must analyse various factors (including the share of the market covered by the practice concerned, conditions for granting the rebates, and their duration and amount) to determine whether loyalty rebates are abusive. It must also apply the AEC test 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*." While the CJEU had already made the relevance of the AEC test clear in the context of anti-competitive pricing (such as *Post Danmark I*) and margin squeeze cases (such as *TeliaSonera* and *Deutsche Telekom*), today's judgment confirms its relevance in the context of rebates (which raise potential foreclosure concerns). This overturns the GC's finding that the AEC test is not relevant in exclusivity rebate cases where "*it is the condition of exclusive or quasi-exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive.*"

Further, the CJEU confirms that dominant undertakings may seek to objectively justify rebate schemes, in which case an analysis of the capacity to foreclose is required.

The CJEU confirms the Commission's jurisdiction over the rebates granted to Lenovo

The judgment also addresses the Commission's jurisdiction to enforce Article 102 TFEU in connection with the rebates granted by Intel to Lenovo (a Chinese company). Intel argued that the conduct was not implemented in the EEA and did not have any substantial effects in the EEA. In fact, the agreements concerned sales of CPUs manufactured and sold outside the EEA, for incorporation into computers manufactured in China. The Commission and GC found that Intel's conduct was implemented, and had effects, in the EEA.

The "qualified" effect criterion – The CJEU first confirms the relevance of the "qualified effects" test to assess the Commission's jurisdiction, such that the Commission has jurisdiction when "*it is foreseeable that the conduct* […] *will have an immediate and substantial effect*" in the EU. In his Opinion, AG Wahl took the view that, while the agreements between Intel and Lenovo may have had qualified effects in the EEA, the GC failed to assess whether the "*agreements had the capacity to produce any immediate, substantial and foreseeable anticompetitive effect in the EEA*." The CJEU rejects this approach and confirms that the allegedly dominant entity's conduct must be examined "*as a whole*" and that "*the probable effects of conduct on competition [be taken into account] in order for the foreseeability criterion to be satisfied.*" It also finds that the conduct was capable of producing immediate effects in the EEA because Intel's conduct vis-à-vis Lenovo was part of an overall strategy to ensure that no Lenovo notebook using an AMD CPU would be available, including in the EEA.

The "implementation" criterion – The CJEU does not examine Intel's arguments regarding the application of the implementation test because the GC "*examined that test for the sake of completeness*". In contrast, AG Wahl took the view that this criterion was not fulfilled: "[n]*othing in the conduct in question* […] *could be characterised as having been implemented, executed or put into effect in the internal market*." In his view, the GC wrongly focused on Lenovo's behaviour on the downstream market (*i.e.*, that Lenovo refrained from selling a certain computer model, potentially including in the EEA) to establish a link to the EEA.

The CJEU rejects the distinction between "formal" and "informal" Commission meetings

Intel's appeal also challenged the GC's conclusion that there was no material procedural irregularity affecting Intel's rights of defence in the Commission's conduct of the interview of a senior Dell executive. Intel argued that the meeting should have been recorded, and that such a recording could have helped its defence. The GC sided with the Commission, finding that the Commission was not obliged to record an informal meeting (as distinct from a formal one).

The CJEU rejects this ground of appeal, finding no administrative irregularity breaching Intel's rights of defence. That said, it goes on to find that Article 19 of Regulation 1/2003 "*is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation*", with there being no distinction between formal and informal Commission interviews. If the Commission conducts interviews aimed at "*collecting information relating to the subject matter of an investigation*", it must record such interviews. This finding will most likely require the Commission to modify its current interview practice.

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