OBSERVATORY ON COMPETITION LAW ENFORCEMENT

Intel…at last!

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On 6 September, the European Union Court of Justice (EUCJ) issued its long-awaited ruling on the Intel Case (Case C-413/14 P). Even though such ruling does not represent a rupture with the previous case-law, it decisively contributes to the lengthy debate concerning an effects-based approach when applying article 102 of the Treaty on the Functioning of the European Union (TFEU).

We should recall that the European Commission imposed a 1.06 billion euro fine on Intel on 13 May 2009 for considering that the undertaking had abused its dominant position by granting clients rebates conditional on them resorting to Intel for all or most of all of their requirements of the concerned product (CPU x86) and also for paying OEMs to limit competing products commercialization.

Following Intel's appeal, General Court's ruling of 12 June 2014, concerning Case T-286/09, did not annul the Commission's decision, giving rise to a tremendous controversy for clearly stating that such exclusivity rebates should be addressed as an abusive practice *per se* without any need to examine the case's specific characteristics and to establish a potential exclusionary effect. In other words, the General Court advocated for a formal approach in the analysis of this type of practices. The General Court also argued that it was not necessary to carry an "as-efficient-competitor test" (or "AEC") to conclude that exclusivity rebates constituted an abuse of a dominant position, even though the European Commission had performed such test in its decision.

The Court of Justice took a different path as to the approach to be taken in these cases, it annulled the ruling and referred the case back to the General Court.

While resorting to previous case-law, (it notably made reference to the dominant undertaking's special responsibility under *Hoffmann-La-Roche* case), it argued that the effects of exclusivity rebates granted by dominant undertakings must be properly appraised before deeming them as restrictive of competition.

We were pleased to note that the Court of Justice started off by stating that article 102 aims not to protect competitors, but to support competition on the merits (paragraphs 133 and 134).

However, the ruling did not chase away the idea of a presumption of illegality of exclusivity rebates granted by a dominant undertaking ("by object" restrictions) (paragraph 137), but did clarify that the undertaking may rebut it by presenting arguments and evidence that dismiss the conclusion (paragraphs 138 and 139). Even if such rebates are considered as restrictive of competition, the dominant undertaking may present an objective justification.

The Court was not so peremptory when addressing whether the Commission was always required to carry out the AEC test or not, but considered that a practice's capacity to foreclose ought to be addressed, notably through the AEC test, and the General Court was required to examine all the arguments put forwarded if the test had been previously performed (paragraphs 140 and 142 to 144).

Despite not definitively "solving" Intel's issue, given that the undertaking still has to show the General Court that the rebates are not restrictive of competition, the Court of Justice's ruling establishes itself as a fundamental piece to ensure a more economic-based or effects-based approach when assessing abuses by a dominant undertaking within a market.

In fact, and even if some questions are left unanswered, like the meaning of "capacity to foreclose", by concluding that exclusivity rebates must be assessed concerning their characteristics and effects instead of being formally rejected – which we deem very wise –, the Court requires the Commission (as well as other competition authorities) to present robust economic cases. It also clarifies the dominant undertaking's position in terms of resorting to an effects-based approach concerning every type of rebates.