Intel versus Commission: an endless case?

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Expectations were high to discover what would be the decision of the General Court (hereafter referred to as "GC") after, in a judgment dated 6 September 2017[1], the European Court of Justice (Grand Chamber) has annulled the first judgment of the saga "Intel v. Commission" and referred to the GC for its review. It considered that, in its *judicial review*, the GC did not take into account the arguments set out by Intel Corporation (hereafter referred to as "Intel"), which, in the opinion of the company, supported the conclusion that the Decision of the Commission was based on an incorrect legal analysis. The new and heavily anticipated judgement of GC came, after so many years (13, to be precise), ruling in favour of the multinational company Intel.

Intel is a company[2] that trades X86 central processing units (CPU). The CPUs are frequently referred to as the "brain" of computers. In 2009, the European Commission, following a report by Intel's rival firm (AMD) and as a consequence of the various investigations managed by this organisation, concluded that for 10 years, Intel held (1997 to 2007) a market share of around 70%, an aspect that, considering the obstacles of market entry and expansion of CPUs makes Intel a company in a dominant position[3] in this market. Therefore, according to the Decision of the Commission, Intel, in the target period of the investigation, took advantage of its dominant position with a view to exclude from the market the company's direct competitor: AMD. The practices of Intel consisted of granting discounts to computer suppliers, with the condition that they would buy all (or almost all) of the Intel X86 CPUs. Furthermore, Intel made payments to MSH, the biggest computer retailer in Europe, with the condition that MSH exclusively sells computers built with the Intel X86 CPU.

The Commission concluded, in the Decision that came to be contested, that the conduct of Intel constituted a violation of article 102 TFUE. In the understanding of the Commission these conducts had the sole objective of excluding Intel's only effective

[1] Judgment dated 6 September 2017, *Intel Corporation v. Commission*, in case C-413/14P, available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/.
[2] The concept of "company", among others, is covered by the Judgement of 23 April 1991, *Klaus Höfner v. Macroton GmbH,* case C-41/90 available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/.
[3] The concept of "dominant position", among others, is covered by the Judgement of 14 April 1978, *United Brands v. Commission,* case C-27/76 available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/.

competitor in the market of X86 CPUs, AMD. Based on this understanding, the Commission gave the multinational company a fine to the value of EUR 1.06 million.

Therefore, after the appeal was declared unfounded in 2014, and the Court of Justice, also on appeal, referred the case back in 2017 for reconsideration, the GC has now come to examine, in the light of the arguments presented by Intel, the extent to which the discounts granted could restrict market competition.

In the judgment under review, the GC, following some literary thinking, establishes that, although a discount system introduced by a company occupying a dominant position in the market may be, by its nature, capable of restricting competition, what is certain is that this is merely a presumption *iuris tantum* and not an infringement *per se* of Article 102 TFEU, and the Commission is in no way exempt from examining its (possible) restrictive effects on competition. Thus, it was entrusted to the Commission to not only analyse the effects of such discounts carefully and concretely, but also to analyse the arguments put forward by the company when, based on evidence, it sought to demonstrate that its practices were not sufficiently capable of restricting and weakening competition. To that extent, the GC highlighted the test carried out by the Court of Justice in its 2017 judgment, which served as an example with which the Commission should guide its investigations in order to determine the restrictive capacity of the discounts granted by Intel. Thus, there would be 5 points of criteria that the Commission should consider in order to demonstrate an infringement of Article 102 TFUE. They are as follows, the extent of the company´s dominant position in the relevant market, the share of the market covered by the contested practice, the conditions and arrangements for granting the rebates in question, their duration and their amount, and finally, the Commission would have an obligation to examine the possible existence of a strategy to exclude Intel´s competitors.

In the judgment under review, the GC somehow clarifies the *Hoffman-La Roche* jurisprudence. For the GC, the Decision of the European Commission was based on an erroneous interpretation of that judgment. The GC agreed with Intel on this point, considering that the Commission infringed the Decision under review due to an error of law when it assumed that the *Hoffman-La Roche* jurisprudence exempted it from analysing the extent to which discounts could restrict competition. It took from the GC's arguments that the Commission was not allowed to “jump” to the conclusion that

discounts would, by their nature, be contrary to competition law without first carrying out a full analysis of the actual effects[4].

The *quasi-criminal* nature of proceedings relating to anti-competitive practices led the judges of the General Court to clarify that the principle of the presumption of innocence, as a general principle of European Union law enshrined in article 48, no. 1 of the Charter of Fundamental Rights of the European Union, should be taken as a guiding principle for the role of the Commission in cases of possible violations of competition rules, which result in fines or periodic payments of fines to companies. Therefore, the Commission must declare the existence of a violation of competition law supported by sufficiently precise and consistent probative evidence. If this is not the case and if there are doubts as to the (un)lawfulness of the practices carried out by the companies, it will always have to be admitted that in *dubio pro reo*. This judgment urges the need to abandon mere theories (as appears to have been the case in the Decision of the Commission *sub judice*), and as such, the Commission must focus on clear, precise and sufficiently documented evidence and not base its Decisions on mere presumptions.[5]

Finally, the GC analysed the application of the "as-efficient competitor test" (AEC) and found that this too was supported by errors. These errors are related to the calculation of the "contestable part", errors regarding the value of discounts granted by Intel and also regarding the insufficiently justified extrapolation of the results of a quarter for the entire period of the infraction.

It is clear from the judgment of the General Court "*that the analysis carried out by the Commission is incomplete and, in any event, does not make it possible to demonstrate legally enough that the discounts at issue were capable or likely to have anti-competitive effects, so that the General Court annuls (…) the contested decision imposing a fine of EUR 1.06 billion on Intel for the alleged infringement.*"[6]

As for the future, Brussels has already ensured that it will appeal the GC´s decision, so the only thing we can do is to wait for the next episodes of this saga. For now, the European Antitrust Law requires a reflection on its enforcement. Moreover, this

[4] Paragraph 145 of the Judgment dated 26 January 2022, *Intel Corporation v. Commission,* case T-286/09 RENV, available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/.
[5] Starting from paragraph 160 of the Judgment dated 26 January 2022, *Intel Corporation v. Commission,* case T-286/09 RENV, available at: https://curia.europa.eu/jcms/jcms/Jo1_6308/
[6] Press release nº 16/22, the General Court of the European Union, Luxembourg, 26 January 2022, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf

case particularly highlighted that the lack of speed in law enforcement is, unfortunately a problem without any boundaries, and that goes across all the legal orders.