The *Intel* Judgment: (Re)balancing the Burden of Proof

On January 26, the General Court (**GC**) of the European Union issued a judgment on remand,[1] annulling the €1.06 billion fine that the European Commission (**EC**) had imposed on Intel in 2009.

Companies commonly use rebates to maximize sales. From an EU antitrust law perspective, such discount schemes are generally not problematic. However, dominant firms may sometimes apply discounts in a way that distorts competition, for example when they are applied in a discriminatory or arbitrary manner or if they provide de facto exclusivity to the supplier. In this respect, which rebates can be considered lawful has been the subject of much controversy. The traditional rigid, formalistic approach that the European courts used to adopt regarding rebates granted by dominant firms could often punish healthy competition on the merits.

To understand the context for the EU courts' latest ruling on this issue, it is necessary to go back to 2017, when, in the *Intel* case, the Court of Justice of the European Union (**Court of Justice**), the highest court in the European Union, broke with tradition and held that not every foreclosure effect is necessarily detrimental to competition. More precisely, the Court of Justice held that the GC had erred in law by failing to consider Intel's criticism of the so-called as-efficient competitor (**AEC**) assessment of the impact of the rebates at issue in the EC decision.[2] The Court of Justice thus set aside the GC's ruling and referred the case back to the lower court for fresh review.[3] This landmark judgment was lauded for its effects-based, non-dogmatic approach.

The GC, on remand, implemented the Court of Justice's ruling and subjected the 2009 EC decision to close factual scrutiny, which this decision ultimately could not withstand. At the same time, the GC ruling clarifies the applicable legal standard and discusses in more detail apportionment of the burden of proof.

This long-running saga is not necessarily over, because the EC might decide to appeal this latest ruling to the Court of Justice.

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[1] Judgment of January 26, 2022, *Intel Corp. v. European Commission*, Case T-286/09 RENV, EU:T:2022:19.
[2] The EC's 2010 Guidance Paper on Exclusionary Abuses adopted the AEC test as the preferred filter for distinguishing unlawful behavior from competition on the merits.
[3] Judgment of September 6, 2017, *Intel Corp. v. Commission*, Case C-413/14 P, EU:C:2017:632, with rectification order in Case C-413/14 P-REC, September 19, 2017; Court of Justice Press Release 90/17, September 6, 2017, EU:C:2017:700.

I. Background

a) The EC Decision, the First GC Judgment and the Opinion by the Advocate General

In June 2009, the EC found that Intel had abused its dominant position[4] under Art. 102 of the Treaty on the Functioning of the European Union (**TFEU**) (roughly equivalent to Section 2 of the US Sherman Act's prohibition of monopolization) on the x86 central processing unit (**CPU**) market.[5] The EC identified two types of abuse:

- Conditional rebates, i.e., rebates granted to original equipment manufacturers (**OEMs**) (Dell, Lenovo, HP and NEC) and MSH, a retailer, on the condition that they buy all, or almost all, of their CPU requirements from Intel; and
- "Naked restrictions," e.g., direct payments made to OEMs in order to halt or delay the launch of specific products containing a competitor's x86 CPUs.[6]

In light of those findings, the EC imposed on Intel a fine of €1.06 billion. The decision was upheld by the GC in its first judgment in June 2014.[7]

Intel appealed to the Court of Justice on a number of grounds, both substantive and procedural. In October 2016, Advocate General (**AG**) Wahl gave his nonbinding opinion, in which he challenged most aspects of the GC's first decision.[8] In particular, he disagreed with the GC's finding that the conditional rebates in question were "*exclusivity rebates*," which, under the Court of Justice's traditional case law, were seen as by their very nature capable of restricting competition and foreclosing competitors. The AG considered that an examination of "*all the circumstances*," i.e., the economic and legal context of the case, is necessary to establish a breach of Art. 102 TFEU, even in the case of presumptively unlawful practices, such as loyalty rebates.[9]

The AG also suggested that the GC should have examined the AEC test in the EC decision. This test posits that conduct by a dominant undertaking should be found unlawful only if it would exclude an equally efficient rival.[10] While he stated that the case law did not impose a legal obligation to use the AEC test, he considered that this test was relevant in this case. This is because the EC had

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[4] The EC found that in the 10-year period that was examined (1997 to 2007), Intel consistently held a market share in excess of or around 70%.
[5] Case COMP/37.990, *Intel.* The EC's summary decision is in OJ C227/13, September 22, 2009; the decision is available on the EC's website.
[6] The naked restrictions, which were left untouched by the Court of Justice, were deemed to be unlawful insofar as the applicant pursued an "anti-competitive object," i.e., sought to deprive consumers of a choice (GC 2014, para 204). In its ruling in 2022, the GC relied on its previous 2014 assessment and stated that these naked restrictions were not the subject of the proceedings on remand.
[7] Judgment of June 12, 2014, *Intel Corp. v. European Commission*, Case T-286/09, EU:T:2014:547.
[8] Opinion of AG Wahl of October 20, 2016, *Intel Corp. v. European Commission*, EU:C:2016:788.
[9] AG Opinion, paras 60–106.
[10] The economic analysis carried out in this test concerns, in this case, the capability of the rebates to foreclose a theoretical competitor that is as efficient as Intel. More precisely, the analysis seeks to establish at what price a competitor as efficient as Intel and facing the same costs as Intel would have had to offer processors in order to compensate an OEM or retailer of microelectronic devices for the loss of the rebates at issue, in order to determine whether, in such a situation, that competitor could still cover its costs.

carried out an extensive AEC analysis in its decision and the other circumstances were equivocal regarding their effect on competition.[11]

b) The Court of Justice Ruling

The Grand Chamber of the Court of Justice issued its judgment in September 2017. The Court of Justice recited recent case law, according to which the purpose of Art. 102 TFEU is not to prevent an undertaking from acquiring, on its own merits, the dominant position in a market, nor to ensure that less efficient competitors remain in the market. The Court of Justice further held that "*not every exclusionary effect is necessarily detrimental to competition*."[12] However, a dominant undertaking has a special responsibility not to allow its behavior to impair genuine, undistorted competition. The Court of Justice repeated the traditional view that, unlike volume-based rebates, rebates tied to exclusivity conditions are presumptively unlawful when granted by a dominant undertaking.[13] However, it broke with tradition to hold that where the company concerned submitted—during the EC administrative procedure and based on supporting evidence—that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, it was then incumbent on the EC to analyze several factors to determine whether the rebates are in fact capable of restricting competition:

- The extent of the defendant's dominant position in the relevant market;
- The market coverage, duration, amount, specific conditions and arrangements of rebates; and
- The possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant defendant from the market.[14]

The Court of Justice added that the assessment of the rebate scheme's capacity to foreclose is also relevant in assessing possible justifications for the conduct. The Court of Justice explained that this balancing of the favorable and unfavorable effects on competition of the practice in question can be carried out in the EC decision only after the EC analyzes the "*intrinsic capacity*" of that practice to foreclose competitors that are at least as efficient as the dominant undertaking.[15] The Court of Justice then stated that if, in a decision finding a rebate scheme abusive, the EC carries out such an analysis, the GC must examine all the applicant's arguments seeking to call

[11] AG Opinion, paras 164–169. The EC stated, in para 925 of its decision (cited above), that although the rebates in question were tied to exclusivity conditions—a fact that, under the EU courts' traditional case law, sufficed to establish an infringement under Art. 102 TFEU in the absence of any objective justification—the EC would also demonstrate by an AEC analysis that "*on top of fulfilling the conditions of the case law*," these rebates were able or likely to cause anticompetitive foreclosure.
[12] Court of Justice, para 134.
[13] Court of Justice, para 137, citing judgment of February 13, 1979, *Hoffmann-La Roche v. Commission*, EU:C:1979:36.
[14] Court of Justice, para 139.
[15] Court of Justice, para 140.

into question the validity of the EC's findings concerning the ability of the rebate concerned to foreclose competition.

In other words, the Court of Justice found that despite the EC's statement that the AEC test it had conducted was only additional support for its decision, this test played an important role in its legal assessment. Therefore, the GC had been wrong to hold that it was not necessary to consider whether the EC had carried out the AEC test correctly, or to review Intel's alternative calculations. The GC was in fact required to examine all of Intel's arguments concerning that test, which it had failed to do.[16]

II. The GC's Ruling on Remand

On remand, the GC clarified the applicable legal standard and discussed in more detail the apportionment of the burden of proof. The GC began its review by examining whether the EC's assessment complied with the legal principles set out in the Court of Justice's judgment.

a. Foreclosure Capability and Presumptive Unlawfulness

In line with the Court of Justice's decision, the GC confirmed that the EC had been wrong to hold, based on a "*traditional interpretation*" of the case law, that it was not necessary to demonstrate the foreclosure capability of the rebates in question.[17] Despite the EC's assertions to the contrary, the AEC test played an important role in the EC's assessment of whether the rebates at issue were capable of foreclosing as-efficient competitors, as had been noted by the Court of Justice.[18] Subsequently, the GC outlined some basic principles with regard to the standard of proof, discussed below.

b. Burden and Standard of Proof

Despite its noteworthy break from tradition, the Court of Justice's judgment was unclear as to the importance of the AEC test in an Art. 102 TFEU analysis. In its second bite at the apple, the GC endeavored to bring clarity.

At the outset, the GC highlighted that the analysis of the capacity of the rebates at issue to restrict competition forms part of the demonstration of the existence of an infringement of competition law. In this regard, the principle of the presumption of innocence, which applies to antitrust law, requires the EC to establish the existence of such an infringement, where necessary by means of a precise and consistent body of evidence, so as to leave no residual doubt in that regard.[19]

[16] Court of Justice, paras 144–147.
[17] GC 2022, para 132.
[18] Court of Justice, paras 143–144; see also GC 2022, paras 144–149.
[19] GC 2022, para 161.

Where the EC maintains that the established facts can be explained only by anticompetitive behavior, it must be found that the infringement at issue has not been sufficiently demonstrated where the undertakings concerned put forward a separate plausible explanation of the facts.[20] In such a case, the EC has failed to adduce proof of an infringement.

However, where the EC relies on evidence that is, in principle, capable of demonstrating the existence of an infringement, it is for the undertakings concerned to demonstrate that the probative value of that evidence is insufficient.[21] The GC also noted that although the EC can rely on presumptions, there was no per se infringement of Art. 102 TFEU in the case at hand; such an infringement would relieve the EC of the obligation to conduct an effects analysis.[22]

c. The Errors in the EC's AEC Analysis

The GC went on to examine Intel's arguments regarding the errors allegedly made by the EC in its AEC analysis. In light of these arguments, the GC found that the EC did not establish to the requisite legal standard the capacity of each of the rebates at issue to have an anticompetitive foreclosure effect.[23] In particular:

- The evidence relied on by the EC to conclude that the rebates granted to Dell and HP were capable of having a foreclosure effect throughout the entire infringement period was insufficient.[24]
- There was insufficient evidence regarding the capacity of the rebates granted to Lenovo to have a foreclosure effect, on account of errors made by the EC in the quantified assessment of the non-cash advantages at issue.[25]
- As for the rebates granted to NEC, the GC found that the EC's assessment was erroneous with respect to (i) the value of the conditional rebates and (ii) the extrapolation of the results for a single quarter-year period to the entire infringement period.[26]
- The EC's AEC analysis for the rebates granted to MSH was also erroneous, given that the EC did not explain the reasoning that led it, in the analysis of the payments made to that retailer, to extrapolate the results obtained, for the purposes of analyzing the rebates granted to NEC, for a one-quarter-year period and apply them to the entire infringement period, as representative for all OEMs supplying MSH.[27]

[20] GC 2022, para 165.
[21] GC 2022, para 166.
[22] GC 2022, para 124.
[23] GC 2022, para 482.
[24] GC 2022, paras 168–335.
[25] GC 2022, paras 412–457.
[26] GC 2022, paras 336–411.
[27] GC 2022, paras 458–481.

In this context, the GC restated several principles on how the probative value of documents should be assessed, depending on the detail, origin and context of the document.[28]

d. The Full Annulment of the EC Decision

Based on the above, the GC found that the EC did not properly consider in accordance with the case law of the EU courts all the criteria making it possible to determine the capacity of the pricing practices to have a foreclosure effect. In particular, the EC did not properly take into account the criterion relating to the share of the market covered by the contested practice, nor did it analyze correctly the duration of the rebates. For that reason, the EC's analysis does not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or were likely to have, anticompetitive effects.[29]

Consequently, the GC annulled the EC's decision, insofar as it found that those practices constitute an abuse within the meaning of Art. 102 TFEU. The GC also annulled in its entirety the fine of €1.06 billion that had been imposed on Intel, as the GC could not identify the amount of the fine that related solely to the other part of Intel's conduct, the so-called naked restrictions.[30] This finding is interesting because the GC enjoys unlimited jurisdiction regarding the level of antitrust fines.[31]

III. Key Implications

- For decades, it seemed that the EC could do no wrong in Art. 102 TFEU abuse cases. Annulments of EC decisions in this field have been few and far between. The 2017 judgment of the Court of Justice seemed to herald a new era, which the GC's judgment now confirms. The GC's ruling raises the bar for the EC to conclude that an abuse occurred. The GC's 537-paragraph judgment carefully considers a very large and wide array of facts in dispute, pieces of evidence and arguments in order to ascertain whether Intel was right to contest the EC decision and whether the EC had sufficient grounds to decide as it did. This portends more judicial scrutiny of EC Art. 102 decisions than had traditionally been the case.
- In practice, the EC will now have to be more circumspect in the way it conducts its abuse investigations. Such investigations have always been fact-intensive, but this essentially concerned establishing the existence and duration of the conduct under investigation. Economic evidence of anticompetitive effect will now have to take center stage. In effect,

[28] GC 2022, e.g., paras 195, 213–218, 227, 379.
[29] GC 2022, paras 524–526.
[30] GC 2022, paras 527–530. According to the GC, in reply to a question of April 2, 2012, seeking to ascertain—as regards a possible adjustment to the amount of the fine should the contested decision be annulled in part—the relative value of the infringements consisting of the exclusivity payments compared with the infringements consisting of the naked restrictions, the EC replied solely in relation to the gravity of the infringements, arguing that it had assessed the conduct in question as a whole and had come to the view that those infringements complemented and mutually reinforced one another.
[31] Art. 261 TFEU and Art. 31 of Regulation (EC) No. 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

the EU courts may have breathed new life into the earlier EC attempt to instill a more scientific basis for its Art. 102 enforcement.[32]

- It remains to be seen how the massive fines imposed by the EC in its more recent *Qualcomm* and *Google* investigations will fare in this new world. If only to preserve its position in these cases,[33] the EC may be tempted to bring the case again to the Court of Justice. Crafting an appeal on points of law against a judgment that is essentially grounded in fact may prove an uphill battle, but experience shows that it is always possible to find an issue of law somewhere in a judgment as lengthy as the GC's. The challenge will be to demonstrate how central that issue would be to the outcome of the case.
- If the EC decides not to appeal, the next question it will have to face is whether to seek to correct the mistakes made, readopt its annulled decision and again fine Intel for its past conduct. However, in view of the lack of evidence and the contradictions in the EC's reasoning, which the GC emphasized, this may prove a massive undertaking. In the past, the EC mainly sought to readopt fining decisions when they had been quashed for formalistic or procedural reasons, eschewing a renewed fight when the reason for annulment was substantive. One option for the EC might be to limit its new decision to developing a fining methodology for the naked restrictions, which the EU courts did not challenge. By definition, such a fine should be considerably smaller than the original €1.06 billion imposed in 2009.
- The immediate consequence of the judgment is that the EC must now reimburse the 2009 fine to Intel, presumably including some default interest.[34]
- One question that remains unanswered is the extent to which the EC would still be able to carve out certain types of conduct by the dominant firm that would be deemed so egregious for competition that they would not require a detailed economic effects analysis, inasmuch as they would be deemed incompatible with competition on the merits and would have no other economic or objective justification than to seek to restrict competition. Indeed, the judicial confirmation of the EC's findings on the naked restrictions suggests that some behavior may still be condemned on the basis of a superficial analysis. In the 2014 GC decision, the so-called naked restrictions conduct was deemed to be unlawful insofar as Intel was found to have pursued an "anti-competitive object," i.e., sought to deprive consumers of a choice.[35]
- In that context, it has been suggested that the fact that an abuse finding may be based on the risk of future anticompetitive impact, as opposed to the actual past impact of allegedly abusive conduct, would somehow lower the evidentiary bar for the EC.[36] It is far from

[32] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, pp. 7–20.
[33] Case T-235/18, *Qualcomm* (pending appeal) and Case T-604/18, *Google Android* (pending appeal).
[34] Judgment of January 20, 2021, *European Commission v. Printeos SA*, Case C-301/19 P, EU:C:2021:39; judgment of January 19, 2022, *Deutsche Telekom v. European Commission*, Case T-610/19, EU:T:2022:15.
[35] GC 2014, para 204.
[36] Opinion of Advocate General Rantos delivered on December 9, 2021, *Servizio Elettrico Nazionale SpA*, Case C-377/20, EU:C:2021:998, para 116.

certain, however, that the EC will be able to avoid an economic challenge to its theory of harm, even if its case is based on a potential rather than actual risk to competition. While the new direction taken by the EU courts in abuse of dominance matters can only delight all those who feel that the imposition of massive, quasi-criminal fines by an administrative body should be subject to much closer judicial scrutiny, the extended timeline of the *Intel* case also confirms that anyone wishing to challenge an EC abuse of dominance decision should plan to be in it for the long haul.[37]

- Finally, these judicial developments may be seen as validating the EC's attempt to sidestep the evidentiary debate in abuse cases through the adoption by the EU legislator of its proposal for a Digital Markets Act (see our WilmerHale webinar),[38] which will allow the EC to impose massive fines on operators of large new-economy platforms for certain types of conduct branded anticompetitive by law.

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WilmerHale would be pleased to help you if you have any questions about your pricing strategy and, more generally, EU antitrust law. Furthermore, WilmerHale has extensive experience in European litigation, with lawyers having individually appeared in approximately 100 cases before the EU courts. For any queries, please contact the lawyers listed below.

[37] In *Solvay*, the Court of Justice annulled in 2011 an EC decision that had been originally adopted in 1990 and readopted in 2000. See Judgment of October 25, 2011, *Solvay SA v. Commission*, Case C-109/10 P, EU:C:2011:686.
[38] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

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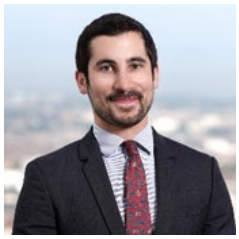

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