

IL CASO INTEL: DECISIONE SUGLI EFFETTI, EFFETTI DELLA DECISIONE

Intervento programmato di Rino Caiazza

1. Let me note first that the assessment of, at least, the potential anticompetitive effects is always necessary since the entire body of antitrust laws looks at actually preventing distorted competition consequences of market structures and business conducts. The antitrust world is not a world of formalism!
In addition, I note that Art. 102 TFUE does not contemplate the distinction between violations by object and by effect (as art. 101), I will come back on this later.
2. As Advocate General Wahl states in his opinion in an interesting historical excursus, since the first **seminal judgment, Hoffman Laroche**, in loyalty rebates cases the Commission has always carried out **a substantial analysis also of the economic circumstances in relation to the allegedly abusive conduct**.
3. The General Court in this case has tried to categorize the types of discount in order to apply a **taxonomy** approach (usually very appreciated by economists).
4. However, according to the Advocate General and the ECJ in a case as the one at stake (loyalty rebates conditional upon the customer purchasing all or almost all its requirements, **without a formal obligation of exclusivity**), the verification of the existence of actual potential anticompetitive effects on a case by case basis cannot be avoided and no general taxonomy approach can be adopted.
5. In particular, certain elements must always be verified such as: **system of discounts coverage** (i.e. share of market affected by conduct), **actual duration** (also by means of repeated short contracts), **intent** (possible existence of an exclusionary strategy vs. competitors, an element that recurs in almost every known case), but also the existence of objective justifications for the conduct and advantages in terms of efficiencies and benefits for consumers. As the ECJ stated: *“The balancing of the favourable and unfavourable effects of the practice in question can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking”* (para 140).
6. This is an important element of the judgment in respect to the traditional principle that a dominant company has a *“special responsibility not to allow its conduct to impair genuine, undistorted competition on the market”*. In other

words, the analysis of the potential anticompetitive effects must not be levelled down to the inefficient competitors, but raised to the category of the “**as efficient**” competitors. Inefficient competitors do not deserve any protection by antitrust laws, their market exit may be procompetitive and even beneficial to the market.

7. To this purpose, the Commission itself had carried out the AEC test and, although during the judicial controversy it had qualified such test as done *ad abundantiam* and not indispensable to assess the anticompetitive nature of the discount scheme **per se anticompetitive**, the ECJ considered the AEC test as essential in the decision of whether the discount scheme of Intel was capable of having foreclosure effects on “as efficient” competitors (para 143).
8. The substance of this case in conclusion seem to me that **the violations under art. 102 always require** a substantial analysis of the economic circumstances in relation to the allegedly abusive conduct.
9. But, in my opinion, the **outcome of this judgment cannot be that the effects analysis is always indispensable on a case by case basis**. As the Advocate General argued, in an interesting parallel with the violations under art. 101 by object, “**the legal and economic context**” of the conduct must be examined in order to ascertain the very illegal nature of the violation in order to exclude, as it is done normally for art. 101 infringements, any other plausible explanation for that conduct (para 82 of the opinion).
10. This means that all elements must be analyzed and evaluated, not only the economic ones, but it means also that with regard with other types of conduct the taxonomy approach could well be adopted. For example in case of **dominance assessed in relation to a very high level of market share the anticompetitive effects of certain types of conduct could be presumed (as it is for the art. 101 analysis as to hard core restrictions)**.

Certainly, this is very difficult for abuses concerned with lower or discounted prices and the related immediate benefit for consumers. In these cases a balancing of interests must be made on the basis of a far-sighted market structure vision. This has been successfully done in the past by the case law, for example in the predatory pricing cases where only prices below a certain level (LRIC) are nowadays considered an illegal conduct with a taxonomy approach and above those a qualified legal element is also required to consider the conduct as an infringement, the intent.

I believe that this approach is fundamental in order to insure **certainty** to the enforcement of antitrust laws and conforms to modern **justice standards**. Nobody could be sanctioned if he cannot know **ex ante** that his conduct is

illegal, thus the assessment of the illegal nature of such conduct cannot be made **ex post**.

11. Finally, from a **procedural viewpoint**, since the Commission had actually carried out the AEC test and Intel had specifically and analytically criticized the alleged mistakes made by the Commission, the General Court was bound to address Intel arguments in its judgment. It had committed a mistake in not examining this point. This was a major procedural failure of the judgment of first instance that the ECJ could easily detect and understand, far more than the importance of an AEC test. In my view this failure has had a material impact on the ECJ decision.