The systemic importance of the ECJ *Intel* judgment

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Background

- Paragraphs 133-140 of the ECJ *Intel* judgment make a fundamental contribution to the systematization of the EU case law on abuse of dominance
- Ten years ago, the debate which preceded the adoption by the European Commission of the Guidance Paper on exclusionary abuses made it clear that:

a. the substantive criteria for the application of Art. 102 should enable enforcers to distinguish between the protection of competitors and the protection of competition, in particular with respect to the price conduct of dominant companies

b. types of conduct which have the same impact on competition should receive equal treatment under competition rules

The recent ECJ case-law on exclusionary abuses

Since the adoption of the Guidance Paper the ECJ, taking into account the historical case-law (*Hoffmann-La Roche, Akzo)* and not always following a straight path, has made efforts to indicate a way forward which enables to meet both challenges

In this perspective, the *Intel* judgment is a landmark decision that will have a systemic impact, similar to the impact of *Cartes Bancaires* on the application of Art. 101 TFEU

Goal of Art. 102 and efficiency justifications

Prior to the *Intel* judgment, the ECJ had already clarified two crucial issues with respect to the assessment of the price conduct by dominant companies:

a. the purpose of the application of Art. 102 is not the protection of competitors, but the protection of the competitive process (*Hoffmann-La Roche; Akzo, Post Danmark I*): competitors less efficient and thus less attractive to consumers from the point of view, *inter alia*, of price, choice, quality and innovation, may well be foreclosed as a result of the competitive process. This is also the starting point of the analysis by the ECJ in *Intel* (§ 133-134)

b. in the application of Art. 102 not only objective justifications, but also efficiency justifications are admissible (*Post Danmark I*)

Assessment of rebates

The substantive criteria for assessing whether rebates by a dominant company are abusive remained controversial. Four different regimes:

a. price-based conduct different from rebates (predation-*Akzo;* margin squeeze–*Deutsche Telekom;* selective price cuts–*Post Danmark I*): the ECJ refers to the capability to foreclose an AEC and to the assessment of the impact of the conduct on the market

b. quantity rebates: generally lawful; they may be prohibited only by showing a negative impact on competition on a case by case basis

c. rebates different both from quantity rebates and exclusivity rebates (fidelity building rebates): may be abusive; the assessment of capability to foreclose a AEC is not needed (although it is a possibility); however, it is not sufficient to look at the bilateral relation, all economic circumstances must be taken into account (*Post Danmark II*)

d. exclusivity rebates according to the GC in *Intel*: generally illegal, pursuant to a pure form-based approach. Irrelevant to argue that the conduct is not capable of restricting competition by looking at the economic context

The problems raised by the GC approach in *Intel*

a. inconsistency in the treatment of different conduct by the dominant company: can a form-based approach to exclusivity rebates be justified by a different potential impact on competition compared to other types of rebates? Why for this kind of conduct the assessment of the economic and legal context is irrelevant?

b. asymmetry between the application of Article 101 and Article 102: for Art. 101 the ECJ always acknowledges not only the possibility to apply Art. 101 (3), but also the possibility to consider the economic and legal context when assessing whether an agreement is prohibited pursuant Art. 101 (1), even for those agreements which are typically considered restrictive by object

c. reliance on the possibility of efficiency justifications and objective justifications is not the same thing as proving that the conduct has not an adverse impact on competition: it is much more difficult (almost impossible)

The ECJ in *Intel:* the refinement of the case-law on exclusivity rebates

In *Intel*, following the suggestions of AG Wahl, the ECJ, while stressing continuity with the old case law (*Hoffmann La Roche*), overcomes all these sources of concern.

The judgment focuses on two main aspects:

a. the proper use of form-based versus impact-based assessment in the application of Art. 102 to rebates

b. the role of objective and efficiency justifications in the assessment of the conduct of dominant companies

Form-based versus impact based assessment

- Exclusivity clauses and exclusivity rebates by a dominant company are still considered abusive (*Hoffmann la Roche;* §137) but the undertaking may 'rebut the presumption' by showing that the conduct is not capable of restricting competition and in particular of producing the alleged foreclosure effects (§138). Thus, the assessment of the economic and legal context matters: the qualification of the conduct as abusive may be excluded by taking into account the market position of the undertaking, the share of the market covered by the practice, the conditions of the rebates, their duration and amount (§139)
- By stressing the role of the economic and legal context in the assessment of whether exclusivity rebates are abusive, the ECJ eliminates inconsistencies with the treatment of other conditional rebates and also with the application of Art. 101
- Moreover, this approach to legal presumptions is clearly consistent with an economic vision

Objective and efficiency justifications

In §140 the ECJ states that objective and efficiency justifications can be used "only after an analysis of the intrinsic capacity of the practice to foreclose AEC competitors"

- The assessment of whether the conduct is anticompetitive cannot be skipped
- Efficiency justifications, with the reversal of the burden of proof, represent a separate step of the analysis. Thus, the focus of enforcement in the forthcoming years should be on whether conduct falls within the prohibition, not on whether it can be justified

Some remarks

- In *Intel* the ECJ, with no need to overrule the *Hoffmann La Roche* case-law, has removed some of the most important concerns which, ten years ago, led to the publication of the Guidance Paper on exclusionary abuses
- After *Intel* and *Cartes Bancaires*, both for restrictions by object and for rebates by dominant companies the assessment of the economic and legal context becomes an essential starting point – also for public enforcers when deciding whether to open proceedings

A short look at the *de minimis* issue

- According to some judgments (*Expedia, Hoffmann La Roche, Post Danmark II*), the *de minimis* exception cannot be applied when an abuse pursuant to Art. 102 or a restriction by object pursuant to Art. 101 have already been ascertained
- However, the assessment of the economic and legal context before qualifying an agreement as restrictive by object pursuant to Art. 101, or a conduct as abusive pursuant to Art. 102, still allows to avoid the prohibition when there is no appreciable impact of the conduct/agreement on competition