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## Intel Loses Appeal Against European Antitrust Fine

In a long-awaited judgment issued on June 12, 2014, the General Court upheld in its entirety the European Commission's May 13, 2009, decision imposing a fine of €1.06 billion (\$1.5 billion) on Intel for abusing a dominant position in the market for x86 CPUs. In particular, the court upheld the Commission's findings that Intel's rebates and payments to Dell, HP, NEC, Lenovo and the retailer MSH were conditioned on exclusivity or quasi-exclusivity, and that Intel's cash payments to HP, Acer and Lenovo — characterized as "naked restrictions" by the Commission — were conditioned on those manufacturers' cancelling or postponing the launch of PCs incorporating Advanced Micro Devices' (AMD) x86 CPUs or restricting their distribution. The court further upheld the conclusion that both abuses constituted a single continuous infringement of Article 102 TFEU from October 2002 to December 2007.

The Intel rebates condemned by the Commission took various forms and involved, *inter alia*, quarterly lump sum payments based on the value of the customer's total purchases of Intel x86 CPUs, volume targets, the percentage of the customer's requirements represented by Intel CPUs (*e.g.*, an 80 percent target in the case of NEC), and variable rebates based on the mix and performance of Intel CPUs. In many cases, some of the discounts were designed to enable its recipient to meet downstream competition from PCs equipped with AMD microprocessors and were related only to certain market segments *e.g.*, desktops for corporate customers or notebooks. According to the Commission's decision, in all cases the rebates were conditioned on exclusivity or quasi-exclusivity either for all customer purchases or for certain types of products (*e.g.*, desktops or notebooks) although these conditions were not written into the agreements with HP, Lenovo or MSH. In the case of Dell, there was no written agreement at all, and the Commission's finding of exclusivity rested on its determination that Intel had made clear to Dell that the level of its payments were conditioned on exclusivity.

The General Court fully upheld the Commission's findings concerning the Intel discounts. In keeping with the precedents established in *Hoffmann LaRoche* and *Tomra*, it concluded that exclusive or quasi-exclusive agreements always will infringe Article 102, absent exceptional circumstances justifying the exclusivity or quasi-exclusivity, because they are designed to restrict the purchaser's freedom to choose its suppliers and to restrict rivals' access to the market. According to the General Court, in such cases it is not necessary to consider all the circumstances of the case, whether the conditional discounts have an actual exclusionary effect or the percentage of the market that has been foreclosed. In this connection, the General Court noted that an exclusivity condition is abusive because it enables the dominant firm to leverage its control over the non-contestable part of demand to the part that is contestable. However, the General Court ruled that it was not necessary for the Commission to use a cost-based test to determine whether an equally efficient competitor could have matched Intel's conditional discounts and competed for the contestable part of demand (the as-efficient competitor (AEC) test). It also ruled that the Commission did not have to prove that the discounts were the decisive factor in a customer's purchasing decision and that the Commission was not required to show that Intel's conduct had actually foreclosed AMD or that there had been direct harm to consumers even though the conduct had already taken place before the Commission adopted its decision and the exclusivity conditions only affected 14 percent of the global demand for x86 processors. According

to the General Court, the Commission was required “only to demonstrate that [Intel] had granted a financial incentive which was subject to an exclusivity condition.”

As concerns the alleged naked restrictions, the General Court concluded that the granting of consideration to restrict the launch or distribution of products equipped with AMD processors did not constitute competition on the merits and repeated its conclusions that there was no need to establish actual foreclosure effects.

The General Court also rejected Intel’s claims that the Commission had failed to gather and consider evidence that contradicted its conclusions and that Intel’s rights of defense had been violated by the Commission’s failure to make available to it an internal note of an interview with a key witness.

The General Court’s judgment is important for several reasons. First, it confirms the very strict approach under EU law to exclusivity conditions imposed by a dominant firm even in cases where the exclusivity relates only to a market segment, is *de facto* and has to be inferred from a course of dealing, or the condition is of short duration or can be terminated on short notice (in one case, 30 days). Second, the General Court rejected the relevance of a cost/price test for purposes of assessing the legality of Intel’s discounts despite the Commission’s reliance on this test as a corroborating factor in its decision. The General Court’s rejection of the AEC test is a significant setback for those within the Directorate-General for Competition who have sought to develop an effects-based approach to Article 102 and calls into question the status of the Commission’s Article 102 guidance paper published in 2009, which advocated use of the AEC test as a screening mechanism. Third, the judgment maintains the strict position that, at least where exclusivity is concerned, there is no need to show actual foreclosure effects or harm to consumers. Fourth, the judgment relies heavily on the distinction between exclusivity conditions and discount systems that are not conditioned on full or quasi-exclusivity. In its March 2012 judgment in *Post Danmark*, which involved selective, targeted discounts, the full plenum of the Court of Justice of the European Union indicated, *inter alia*, that the ability of an as efficient competitor to match a dominant firm’s discount without having to sell at a loss is relevant to the assessment of abuse as are actual foreclosure effects, at least in a case in which the conduct already has taken place. In its judgment in *Intel*, the General Court has sought to limit the applicability of *Post Danmark* by concluding that it does not apply to discounts that are conditioned on full or quasi-exclusivity.

The General Court’s *Intel* judgment is subject to appeal to the Court of Justice.

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