Intel Ruling: General Court Failed to Examine All of Intel's Arguments, Court of Justice Says

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On September 6, 2017,[1] the Court of Justice of the European Union (CJEU) quashed the 2014 judgment of the General Court (GC) that upheld a fine of €1.06 billion ($1.5 billion) on Intel Corporation Inc. (Intel) for abusing a dominant market position by implementing loyalty rebates based on exclusivity agreements.

The CJEU ruled that exclusive or quasi-exclusive arrangements may be deemed lawful if the dominant company can demonstrate that (i) such agreements are not capable of foreclosing competitors that are as efficient as itself or (ii) the foreclosure effect is outweighed by objective justifications. It concluded that the GC had failed to consider all arguments put forward by Intel and referred the case back to the GC, which is now tasked to examine Intel's arguments on the capacity of the rebates to restrict competition.

Background of the Case

In May 2009, the European Commission (Commission) imposed a fine of €1.06 billion ($1.5 billion) on Intel for abusing a dominant position in the market for x86 CPUs[2] from October 2002 to December 2007, by implementing a strategy aimed at foreclosing a competitor, Advanced Micro Devices Inc. (AMD), from the market. The Commission considered that Intel was in a dominant position on the ground that it held a market share of roughly 70 percent or more. The Commission also considered that the abuse was characterized by rebates and payments adopted by Intel toward major computer manufacturers (Dell, Lenovo, HP and NEC) and Media-Saturn-Holding (MSH).

The Intel rebate scheme at issue took various forms and involved, notably, 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, 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.

According to the Commission, those measures significantly reduced the ability of Intel's competitors to compete on the merits of their x86 CPUs, and thus resulted in a reduction of consumer choice and in lower incentives to innovate.

By judgment of June 12, 2014,[3] the GC upheld in its entirety the Commission's decision. In particular, the GC 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

[1] Case C-413/14 P, *Intel v. Commission*.

[2] CPUs are key components of any computer, in terms of both overall performance and cost of the system.

[3] Case T-286/09, *Intel v. Commission*.

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"naked restrictions" by the Commission — were conditioned on those manufacturers' canceling or postponing the launch of PCs incorporating AMD's x86 CPUs or restricting their distribution.

Intel appealed the GC ruling to the CJEU on the ground that the GC, in particular, failed to examine the rebates at issue in light of all the circumstances of the case.

Ruling of the Court of Justice

The CJEU restated that a dominant company has a special responsibility not to distort genuine competition through, for example, adopting pricing practices that have an exclusionary effect on competitors that are at least as efficient as itself.

However, the CJEU clarified the case law by stating that, "in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition," the Commission is required "to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market." It added, "The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified."

The CJEU observed that the "as efficient competitor" test had played an important role in the Commission's assessment. For that reason, the GC was required to examine all of Intel's arguments concerning that specific test, which the GC failed to do. As the CJEU has no jurisdiction to assess the facts, the GC is now tasked to examine all elements of that test in light of all the circumstances of Intel's case.

Other grounds of appeal, including issues of territoriality and of rights of defense, were all rejected by the CJEU.

Conclusion

It thus follows from the CJEU ruling that if, in the course of the Commission's investigation, a company submits evidence that its rebate scheme was not capable of foreclosing competitors as efficient as itself, the Commission is under a duty to engage with the evidence and draw the necessary conclusions. It remains to be seen what standard of proof the GC will apply with respect to the evidence submitted by Intel and at what point the burden of proof switches to the Commission.

The ruling is a welcome clarification that rebates conditioned on exclusivity agreements and loyalty rebates are not necessarily prohibited and — more generally — may have a bearing on how the Commission is to deal with arguments made by a company that a particular practice is not capable of restricting competition.

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