

EU General Court Overturns Intel Antitrust Fine

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02 / 07 / 22

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On January 26, 2022, the EU General Court (the Court) annulled the European Commission's (the Commission) decision that Intel had abused its dominant position regarding its x86 central processing unit (CPU) computer chips and the imposition of a €1.06 billion fine. The judgment demonstrates that infringement decisions must be supported by economic analysis, and not rely on form-based condemnation of rebate schemes, and that companies can rely on economic analysis to assess the antitrust compliance of their rebate schemes, which the EC must carefully review in case of investigation.

Key Takeaways From the Judgment

- **Confirms an economics-led approach to dominant companies' pricing practices:** This landmark judgment confirms the move in the Court's jurisprudence away from a form-based condemnation of rebate schemes linked to requirements or high volumes, in favor of an economic assessment of whether a rebate scheme has the potential to exclude an as-efficient-competitor (the AEC standard). This brings the Court's jurisprudence closer in line with the Commission's priorities guidance on Article 102.
- **Importance of an economic rebuttal:** Intel had put forward a detailed rebuttal of the Commission's case to demonstrate that its rebates would not have excluded a competitor with the same cost base as Intel (the AEC). The Court held the Commission had failed to properly assess Intel's economic rebuttal: (i) its approach to the AEC test was invalid; (ii) it did not assess adequately the criteria relating to the share of the market covered by the practices; and (iii) it failed to demonstrate that the rebates lasted for the duration of the infringement period.
- **Greater flexibility in pricing practices:** The judgment is welcome recognition that pricing practices by dominant companies are generally legitimate means of competition. Only whether they are so aggressive as to exclude an equally efficient rival should there be a concern. With appropriate compliance advice, companies can self-assess whether pricing schemes are within legitimate parameters. There is no per se, formalistic, condemnation of schemes linked to specific volumes or proportion of a customer's requirements.
- **Evidential challenges for future cases:** The judgment shows the evidential challenges for the Commission in proving economic intangibles, such as "contestable share," where there can be a range of possibilities, as well as assessing the impact of a scheme by reference to market coverage and duration. It is notable the Commission's recent enforcement practice has moved away from economic assessment to focus on allegedly unlawful planning or intent documents. This may indicate that regulators find economic-based analysis of rebate schemes challenging. It may be questioned, however, whether intent documents are meaningful evidence in relation to pricing practices. The better view may be that these schemes are better judged objectively, on their economic impact, rather than how they are subjectively described in documents.
- **Potential impact on pending cases:** This ruling is very likely to have an impact on how the court looks at other cases in the pipeline, including (i) Qualcomm which was fined almost €1 billion for abusing its market dominance and making payments to Apple, one of its key customers, to ensure it did not source chips from rivals; and (ii) Google Android which was fined €4.34 billion including in relation to alleged abusive revenue share agreements conditioned on mobile operators/handset makers not pre-installing competing general search services on their portfolio of devices.

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Background

The European Commission Decision (2009)

In 2009, the Commission imposed a €1.06 billion fine on Intel for an abuse of dominance after it found the CPU chip supplier had agreed with main desktop original equipment manufacturers (OEMs) to pay substantial rebates in return for supply deals accounting for between 80% and 100% of customers' needs.¹ The rebate in some cases totaled hundreds of millions of dollars. Intel also paid additional amounts to these customers and to a PC retailer to (i) not stock competitor chip-based PCs, (ii) delay the introduction of rival chips and (iii) confine the competitor chips to non-strategic products.

The Commission adopted a twin track analysis of the rebates:

- i. The Commission conducted a detailed economic analysis of the scheme finding that it was likely to exclude an “as efficient” competitor, applying the Priorities Guidance principles.² The Commission conducted the AEC test relying on third-party submissions that showed the contestable share of the market to be 7% and rejecting evidence submitted by Intel that implied a greater contestable share; and
- ii. The Commission also found the conduct would be illegal under the former EU Court's case law that held exclusivity or loyalty rebates illegal (without any detailed economic analysis).

The Commission concluded on this basis that the rebate scheme would have the effect of excluding AECs or require them to offer unviable prices to win customers.

The Appeal

At first instance, Intel's challenge was dismissed. The Court held that the Commission was not under any obligation to conduct any economic analysis to show illegality.³ It was sufficient to identify that rebates based on exclusivity, or on a very high percentage of needs, were likely to be anticompetitive.

The EU Court of Justice (ECJ) reversed on appeal and held that that if a defendant puts forward economic analysis showing non-foreclosure, it would be incumbent upon the Commission, and in this case the Court, to examine whether that analysis is

correct.⁴ The ECJ remitted the case to the Court to conduct the analysis and reexamine Intel's economic arguments concerning the validity of the AEC test as applied by the Commission in its original decision.

The Remittal Judgment

No Rebate Scheme Anticompetitive Presumption

On remittal, the Court confirmed there was no anticompetitive presumption in relation to rebate schemes. Evidence brought forward by a dominant undertaking in defense of its rebate scheme must be reviewed by the Commission in determining whether the scheme has or is likely to have foreclosure effects on the market. The Commission is required to:

- i. consider the extent of the undertaking's dominance in the relevant market;
- ii. analyze the share of the market covered by the rebate scheme together with the associated conditions and arrangements including duration and amounts, in order to determine the existence of any strategy to exclude as efficient competition; and
- iii. take into account where the Commission has carried out an AEC test in order to assess whether the rebate scheme is capable of restricting competition.

The AEC Test

The Commission assessed the foreclosure effects of the rebate scheme upon AECs with respect to four customer OEMs and one retailer. The Commission had made significant errors in its application of the AEC test, miscalculating customers' “contestable share” (that is to say the volume of business that customers would realistically switch to rival chip suppliers) and the value of the rebates.

As to contestable share, the Commission relied upon data from OEM customers to determine the contestable share. Intel's rebuttal evidence showed, however, that the Commission had not proven that this was the only plausible contestable share. So the Commission had not proven its case.

As to the rebates and noncash advantages offered by Intel, the Court held the Commission miscalculated their value because it considered the value to the customer rather than the cost to Intel. As the AEC test is predicated on an as efficient rival, it was the cost to Intel that was determinative.

¹ Commission Decision C(2009) 3726 final of May 13, 2009, relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 – Intel).

² 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, p. 7–20, para. 25.

³ Judgment of the General Court of June 12, 2014, *Intel v. Commission*, T-286/09.

⁴ Judgment of the Court of Justice of September 6, 2017, *Intel v. Commission*, C-413/14 P.

EU General Court Overturns Intel Antitrust Fine

As to coverage of the scheme, the Court faulted the Commission for assessing the impact of the scheme by looking at the shares of the OEMs affected rather than the entire market demand as the Court of Justice required. With respect to the scheme's duration, the Court found the Commission's assessment was partial and

it had erred in only considering the time horizon of the rebate scheme as a component of calculating the contestable share and not as a criteria of itself for determining the scheme's capacity to foreclose.

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