CPI's Europe Column Presents:

The Intel CJ Ruling: More Than A Nudge Towards Economic Analysis

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Although comparisons to Charles Dickens' Jarndyce v Jarndyce are - as yet - unfair, the Intel case is now further away from resolution than it was a few weeks ago and it will now be competing with Air Cargo to see which will be resolved first.

This September 2017 Court of Justice judgement faulted the 2014 General Court ruling for not examining the totality of the evidence on which the Commission relied on in 2009 when it concluded that Intel had abused its dominant position by using anti-competitive loyalty rebates. So the case now goes back to the General Court, and a resolution looks unlikely before a new General Court ruling in 2020, and possibly not even then if the losing party in front of the General Court chooses again to appeal to the Court of Justice.

So this judgement is probably more the beginning of the end of the case than the end of the beginning, but there are still opportunities for conferences and debates stretching for some years yet. Joy.

What have we learned so far?

First, although Advocate General Wahl is not always followed by the Court, it is the way to bet. AG Wahl recommended that the case be referred back to the General Court for fuller consideration of the economic analysis, and it now has been. The Court also mostly agreed with his faulting the General Court on a process issue, but did disagree with him on jurisdiction.

Second - that process issue - means that some meetings with DG Competition will now become rather more formal, with possible consequences for what parties say in those meetings. Intel had argued that the Commission had not properly recorded a meeting with a third party as an interview under Article 19 of Regulation 1/2003. The Commission had argued - and the General Court had accepted - that Article 19 applied only to "formal" interviews, not informal meetings which were then followed up with formal information gathering measures, typically requests for information. The Court has now said that there is no such category of "informal" meetings or interviews, and the paragraphs - 90 and 91 - where the Court sets out its view of Regulation 1 are likely to lead to some tricky discussions:

"90… if the Commission decides, with the consent of the person interviewed, to carry out such an interview on the basis of Article 19(1) of Regulation No 1/2003, it must record the interview in full, without prejudice to the fact that the Commission is free to decide on the type of recording.
"91 It follows that the Commission is required to record, in a form of its choosing, any interview which it conducts, under Article 19 of Regulation No 1/2003, for the purpose of collecting information relating to the subject matter of an investigation."

A couple of points jump out.

First, the recording of any interview must be done "in full". It is not clear if "full" requires an audio recording, or merely extensive notes: the Court seems to leave open the choice.

Second, an interview will need recording if it is "for the purpose of collecting information relating to the subject matter of an investigation." The other language versions suggest that using "information" as opposed to "evidence" was an intentional choice. Information seems a rather broader term suggesting that this is not limited to interviews where exculpatory or inculpatory evidence is

discussed. But this leaves the scope unclear. What about settlement or commitment meetings? Or state of play meetings? If a state of play meeting is called by the Commission for the Commission to explain its position, but a party begins to counter Commission statements with "information", does that then need to become a formal interview? There are some issues to resolve here.

Turning to jurisdiction, the Commission's cartel department is likely breathing a sigh of relief. If AG Wahl's opinion had been followed, then complex cases of single and continuous infringements (SCI) might have needed rather different analysis.

Seeing SCI - I think wrongly - as a purely procedural economy for the Commission, AG Wahl had said that it would be unlawful to bring together in an SCI conduct that could have had no effect in the EU (say a contract between Intel and an OEM in Asia, with products destined for Asia), with conduct that could have EU effects (say a contract with products destined for the EU). The Court disagreed: the "conduct … viewed as a whole" should be taken into consideration to avoid "an artificial fragmentation of comprehensive anticompetitive conduct". As Intel's conduct, according to the Commission decision, was designed to foreclose AMD anti-competitively, and that foreclosure would have effects in the EU, then any part of that conduct should properly be regarded as a part of the unlawful whole.

Turning finally to rebates, what we know is probably less than many had hoped. From the Court press release it looked as though the Court was making a procedural point: if the Commission relied on economic evidence, then the General Court should have examined it (and this is stated in paragraph 141 of the judgement). But other paragraphs suggest this is a substantive issue, with the Court making some incremental, but important changes to the caselaw on rebates, and in particular Hoffmann La Roche.

At paragraph 138, the Court says that Hoffmann La Roche and the caselaw needs to be "clarified", which suggests the Court is proposing a change. The clarification is as follows:

Where the defendant, "submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects."

If this is done, then:

"139 … the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also acquired 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 (see, by analogy, judgment of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, paragraph 29)."

This looks rather less like a procedural requirement on the General Court, and more a substantive requirement on the Commission, assuming a defendant brings forward evidence that its conduct was not capable of foreclosing competition. And which defendant would not do that?

Paragraph 139 - particularly when read together with paragraph 133 - therefore seems to establish the “as efficient competitor” concept into any analysis of rebates - and possibly to collapse the categories of rebates into “volume” and “other”.

That said, the scope of paragraph 139 leaves a lot still to be decided. The kind of evidence required could be a few pages of analysis backed up by contemporaneous documents, or the type of voluminous economic analysis contained in the 2009 Intel decision itself.

Although the Court of Justice has sent this back to the General Court with guidance on how they should have dealt with the appeal the first time, the Court has left substantial room for the Court to determine how it should interpret that guidance.

Scope for plenty more conferences yet.