THE *INTEL* CASE: ISSUES OF ECONOMIC ANALYSIS, COMITY AND PROCEDURAL FAIRNESS

BY LUIS ORTIZ BLANCO & JOSÉ LUIS AZOFRA PARRONDO [1]


I. INTRODUCTION

The recent judgment of the Court of Justice of the European Union ("the Court of Justice" or "the Court") in the *Intel* case[2] drew much attention in the LeadershIP Conference held on Brussels on September 25, 2017. Much literature on the judgment is also being published ever since then although comprehensive and more settled analyses are yet to come as academics and practitioners have further chances to share views on such a relevant piece of case law.

This article aims to contribute a grain of sand to this collective debate on the evolution, not only of competition law, but of European law as a whole. The judgment addresses three main issues: (i) the role of thorough economic analysis in general and the as-efficient-competitor principle in the context of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") in general and loyalty rebates in particular; (ii) comity principles and the jurisdiction of the European Commission ("the Commission"); and (iii) procedural fairness and the rights of the defense. Our paper is structured according to these three points of law.

Below you will find more questions than answers from a couple of practitioners' perspective; indeed, accurate questions precede and generate accurate answers. Here is our try.

1 Luis Ortiz Blanco is a partner in the EU and Competition Law Department at Garrigues. José Luis Azofra Parrondo is a senior associate, EU & Antitrust practice, at Garrigues.

2 Judgment of September 6, 2017, *Intel*, C-413/14 P, EU:C:2017:632.

II. ECONOMIC ANALYSIS: THE AS-EFFICIENT-COMPETITOR TEST

This is undeniably the part of the judgment that raises the most disputes as to what the Court of Justice really meant to adjudicate. In our view, it is not easy to conclude whether the Commission will consider this judgment as a win, as a defeat or as a tie. For the moment, it has carefully avoided giving any views, but one could wonder whether the Court has willingly or unwillingly opened the door to an obligation to drive thorough economic analysis in all abuse-related cases without exception. We first summarize the essentials of the facts and Intel's claims to then look into two alternative readings of this judgment which lead to very different outcomes for the way abuses are to be assessed in the future.

In its Decision,[3] the Commission devoted 575 paragraphs (from 1002 to 1576) to a very detailed analysis of the as-efficient-competitor ("AEC") test. Its conclusion was that an AEC would have had to offer prices which would not have been viable. Unsurprisingly, the Commission had previously advised that Intel's rebates at issue were by their very nature capable of restricting competition such that the AEC test was not necessary in order to find the existence of the abuse (para. 925).

Intel's appeal pursued the annulment of the decision based, among other grounds, on the fact that the application of the AEC test by the Commission was badly flawed and that, had it been correctly applied, it would have led the Commission to the conclusion that the rebates at issue were not capable of restricting competition. The General Court, nonetheless, held in its judgment[4] that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors. Consequently, it attached no relevance to the AEC test carried out by the Commission and did not address Intel's criticisms of that test.

The debate behind this point of law was whether exclusivity rebates by dominant firms are *per se* capable of restricting competition. It was widely accepted that EU Courts' case law on rebates up to the Court of Justice's *Intel* judgment was, without exception, founded on Hoffman-La Roche's quasi *per se* rule of illegality.

At this stage, Intel challenged the General Court's position and argued that it was obliged to examine its line of argument against the Commission's way of applying the AEC test and that, by failing to do so, it had breached its rights of defense provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is evident that the Court did assume Intel's arguments in this regard. What is not as clear, however, is the actual scope of this declaration by the Court in paragraphs 136, 138 and 139. In our view, the judgment can be read in two different ways. One possible reading is that the Court meant to raise a merely procedural flaw by the General Court when refusing to address Intel's arguments over the application of the AEC test by the Commission. The other is that the Court purposely meant to clarify previous case law in the sense that there is no such a thing as a *per se* abusive conduct. The consequences of these alternative interpretations are significantly different.

If we were to assume that the Court of Justice's reproach was of a strictly procedural nature, the case would have a short way to go in terms of legal debate. Indeed, any serious claim by a dominant firm that its pricing strategy was not capable of restricting competition should be examined by the General Court, in order not to breach the firm's rights of defense. However, such a declaration would not shift the burden of proof to the Commission, but it would rather require the General Court to deal with the arguments of the respondent. As regards the administrative procedures, the judgment would have virtually no effects, as the Commission is already used to examining all the arguments put forward by respondents in its decisions, as it did in the *Intel* case with the AEC test.

If, contrary to this, we assumed that the judgment truly meant to go to the substance and the Court required the AEC test to be examined in every case of abuse where respondents allege this defense, then we would be facing not merely a further clarification of the case law (as the Court states in paragraph 138), but a novelty in the assessment of abuses of a dominant position: a movement away from a quasi *per se* rule to the rebuttable presumption perspective.

3 Commission decision of May 13, 2009, COMP/37.990 Intel, D(2009) 3726 final.

4 Judgment of June 12, 2014, *Intel*, T-286/09, EU:T:2014:547.

Should this be the intention of the Court, where a respondent claims that a given competitor is less efficient, the Commission would be required to carry out an AEC test which would no longer be for the sake of completeness or dispensable (as the Commission stated in paragraph 925 of its decision) but it would rather become a substantive element of the assessment, which might later be subject to review by the General Court just as any other ground of appeal.

III. THE COMMISSION'S JURISDICTION AND COMITY PRINCIPLES IN PUBLIC INTERNATIONAL LAW

Although this point of law represented the strongest win for the Commission in the case (the Court of Justice plainly confirmed its jurisdiction over the entirety of Intel's behavior) this has not come without criticism. Indeed, as it will further discussed below, the Court of Justice's application in *Intel* of the relevant tests for establishing jurisdiction to find and punish conduct adopted outside the European Union may not be unproblematic with regard to the perennial debate on whether the Commission's jurisdiction is becoming global in practice.

The dispute around the jurisdiction of the Commission arose in relation to the agreements concluded between Intel and Lenovo (a Chinese company), which played a part in the alleged infringement although they did not involve Intel selling products to Lenovo in the EU internal market. The General Court held that the jurisdiction of the Commission may be established on the basis of either the implementation test (the Commission will have jurisdiction over anticompetitive practices that are implemented in the European Union), or the qualified effects test (the Commission can apply European Union law when it is foreseeable that the conduct will have an immediate and substantial effect in the European Union). In practice, the General Court first assessed the Commission's jurisdiction in the case in light of the qualified effects test and then, in the alternative, in light of the implementation test. The qualified effects test had not, until the *Intel* case, been assessed by the Court of Justice.

Nonetheless, the Court immediately blessed the possibility of approaching jurisdiction from the perspective of the qualified effects of the conduct provided that this test pursues the same objective as the implementation test, i.e. preventing conduct which, while adopted outside of the European Union, has anticompetitive effects liable to have an impact on the internal market (para. 45).

The most important question, however, remains whether the actual conduct of Intel foreseeably had immediate and substantial effect in the European Union. The criteria set by the Court can be summarized as follows: the assessment must be probable ("it is sufficient to take account of the probable effects of the conduct in competition" para. 51), and the conduct must be considered as a whole ("Intel's conduct vis-à-vis Lenovo formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with [a competitor's] CPU would be available on the market, including in the EEA").

This approach merits two comments: one in support of the theoretical articulation of the qualified effects test, the other to ask for careful consideration in the practical application of the test in the light of comity principles of public international law.

As regards the enunciation of the qualified effects test, it is undisputed that Article 102 TFEU must avoid the artificial fragmentation (see para. 57) of anticompetitive conduct which is capable of affecting the internal EEA market so that individual forms of illicit behavior might not be caught by this provision. In paragraph 43, the Court draws a parallel with the case law applicable to territorial jurisdiction issues over Article 101 TFEU.

With regard to the application of the test in practice, the Commission (and the European Courts when deciding appeals) should be careful not to encroach on other countries' jurisdictions. International comity, by virtue of which one nation allows within its territory the judicial acts of another nation (in this case, the European Union), cannot be abused in the process of asserting jurisdiction even when at risk of not enforcing competition rules in its entirety. This was one of Intel's arguments against the qualified effects test, which would in the undertaking's opinion give rise to jurisdictional conflict with other competition authorities and create a risk of double jeopardy. Such a risk is, in our view, not implausible, and should be closely monitored from now on in order to avoid *de facto* assuming global jurisdiction.

IV. PROCEDURAL FAIRNESS AND RIGHTS OF DEFENSE

This is arguably the point of law where the Commission has suffered more clearly a defeat in the *Intel* case (at least so far), although such a defeat was not a sufficient basis for the annulment of the General Court's judgment.

As a brief background, during the administrative procedure the Commission held a meeting with an executive of Dell, a customer of Intel. The Commission did not place the indicative list of topics for the meeting on the case file and did not take minutes of it. A member of the team responsible for the file at the Commission drafted a note which was described as internal by the Commission concerning that meeting. Later on in the procedure, the Commission provided the applicant with a non-confidential version of that note.

Intel initially submitted that by merely drafting an internal note of the meeting, the Commission had infringed the requisites of Article 19 of Regulation No. 1/2003, read in conjunction with Article 3 of Regulation No. 773/2004 (which relate to the procedural treatment of the Commission's powers to take statements). In this regard, Intel relied on a decision of the European Ombudsman of July 14, 2009. In that decision, the Ombudsman concluded that the meeting with Dell's executive should have been classed as a meeting for the purposes of Article 19 of Regulation No. 1/2003, that it could not be excluded that it concerned potentially exculpatory evidence and that the failure to adequately record it constituted maladministration on the part of the Commission.

The General Court then drew a distinction between "formal" interviews and "informal" interviews, where only formal interviews would be subject to the abovementioned rules. Although it recognized that the subjects addressed at that meeting concerned questions bearing an objective link with the substance of the investigation, the General Court held that the meeting between the Commission and Dells' executive did not constitute formal questioning for the purposes of Article 19 of Regulation No. 1/2003 and Article 3 of Regulation No. 773/2004. Thus, the fact that Intel had only been provided with an internal note of the meeting (against the obligation to provide a record of the meetings as mandated by the aforementioned provisions) did not constitute a breach thereof.

The Court of Justice clearly states (i) that Article 19(1) of Regulation No. 1/2003 is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation, and that there is nothing in the wording of that provision suggesting that it establishes a distinction between two categories of interview; and (ii) that the disclosure of the non-confidential version of the internal note drawn up by the Commission in relation to that meeting did not remedy the lack of a record of that meeting.

It is not our intention to discuss here the reasons why these errors have not led to the annulment of the General Court judgment. Rather, we simply posit that the findings of the Court of Justice may have deep implications for the way the Commission currently grants the rights of defense to respondents as regards one of its main investigation tools: interviews and meetings.

First, it cannot be discarded that the judgment has some relevant practical side-effects concerning the behavior of the Commission *vis-à-vis* interviews and meetings, especially in the context of infringement procedures. In this regard, it could be expected that the Commission will be more reluctant to hold meetings in general. This obviously does not have to do with the Commission being willing to deny or to hinder the exercise of the rights of defense of the parties. Rather, the fact that all interviews concerning questions bearing an objective link with the substance of the investigation (which ones do not?) must be recorded leads to a more complicated handling of meetings, not to mention the subsequent obligation to provide all the parties with a non-confidential version of the records.

Second, should the Commission decide to audio-record all meetings, it could be expected that both Commission officials and parties (lawyers and clients) will lose some degree of flexibility in their communications and may encourage that participants perform a previously well-prepared and rigid speech out of which there will be little if any room for constructive improvisation.

Third and last, the judgment may lead to an increase in the number of requests for testimony before the General Court of witnesses or other individuals interviewed by the Commission. Indeed, the Court faults Intel for not having Dell's executive be summoned before the General Court in order to obtain evidence that its submission to the Commission contained proof for its defense. It seems plausible that lawyers will not miss the opportunity to resort to such an – up to now – uncommon procedural tool and that the General Court will have less discretion to deny it, especially if the Commission does not adopt sufficiently sophisticated ways to handle interviews complying with Article 19 of Regulation No. 1/2003.

On another note, it is evident to us that the Court of Justice is hereby expanding the rights of defense of defendants in competition infringement procedures. It is unquestionable that the European Union procedural standard is being enhanced as greater transparency is required by the Court. This is not surprising. It is rather the natural evolution of competition procedural rules. We should remind ourselves that initially under Regulation 17 of 1962[5] the rights of respondents were much more limited. Also, administrative practices were much less generous towards respondents in the 1960's than they are today under Regulation No. 1/2003.

Thus, we perceive a positive note in the *Intel* judgment as regards procedural fairness. It cannot be denied that this involves, to a certain degree, a reproach to the Commission, whose standards as a modern agency towards the rights of defense of respondents will be unequivocally improved. The Commission will merely read the judgment as a call to action but it is yet to be seen how it will deal with the practical downsides that have been mentioned above regarding the handling of meetings.

5 Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty (at present Articles 81 and 82) [OJ No. 013, 21.02.1962].