EUROPEAN COMPETITION LAW: ENFORCEMENT OR REGULATION AFTER *INTEL*?

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I. INTRODUCTION

The recent EUCJ *Intel*[2] decision is a reminder that European competition law looks different from that of the North American jurisdictions. There is no doubt in the United States and Canada that economic effects drive enforcement policy and that a tradition of due process and procedural fairness exists. *Intel* suggests limits to DG Competition's enforcement with regard to due process. In this sense, *Intel* is a wake-up call for DG Competition to reiterate its commitment more generally to procedural fairness.

Although there is some gap as between North American and European views on economic effects in cases, Intel suggests that this gap on effects-based analysis may be narrowing. *Intel* provides a roadmap for further reworking of European case law towards more of an effects based approach. Perhaps Intel offers European competition law a *GTE Sylvania*[3]-like moment with regard to an effects based approach to conduct, where cases had hereunto been form based "by object." *Intel* presents a similar opportunity going forward for DG Competition. The CJEU's judgment reinforces the internal DG Competition view that EC assessments should be effects based (as manifest by the decision itself which contained a detailed as-efficient competitor analysis).

II. PROCEDURAL ISSUES

Due process and procedural fairness are critical to a well-functioning competition policy system. The cornerstone of rule of law is procedural fairness. In Europe, Article 6 of the European Convention on Human Rights provides for due process. This concept also is enshrined in many other jurisdictions that respect the rule of law. When there is a lack of procedural fairness, the result is the impairment of the legitimacy of effective competition law and policy.

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2 *Intel v. Commission*, Case C-413/14 P, JUDGMENT OF THE COURT (Grand Chamber), September 6, 2017.

3 *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

In *Intel*, the Commission withheld exculpatory evidence regarding an interview with a Dell executive by not recording the interview. The Commission argued that because this was an informal rather than formal meeting, the recording of the meeting and placing evidence of the meeting in the case file was unnecessary. In a rebuke to the Commission, the CJEU held that this was contrary to competition law, noting that:

> there is nothing in the wording of [Article 19(1) of Regulation 1/2003] or in the objective that it pursues to suggest that the legislature intended to establish a distinction between two categories of interview relating to the subject matter of an investigation or to exclude certain of those interviews from the scope of that provision.[4]

Such language is a reminder that procedural fairness should be the cornerstone of all investigations. The EC was rightly held to a strict standard given the need to ensure fairness and objectivity in an administrative system.

The lack of procedural fairness makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement. The deleterious effects are more far reaching than any individually badly decided case as lack of procedural fairness threatens the legitimacy of the entire competition policy system.

III. SUBSTANTIVE CONCERNS

In the past, DG Competition actively has promoted economic effects as the basis for its competition policy. However, a prior lack of clarity in the courts has meant that DG Competition has not needed to back up such public talk with a legal standard in particular cases that required effects-based analysis akin to in the merger context.[5] As a result, in a number of Article 101 and Article 102 settings, DG Competition has had victories that have not promoted increased consumer welfare.

Given this background, the *Intel* decision is important in narrowing the gap between effects based analysis in North American and Europe. The CJEU held that the General Court was incorrect in treating exclusivity rebates as akin to a *per se* abuse. The CJEU made clear that companies can dispute the anticompetitive effects of their conduct (even for exclusivity rebates). Further, the CJEU requires the EC to examine those arguments and show that the conduct is in fact capable of restricting competition. The result is that *Intel* actually aligns the law between the jurisdictions better than had been the case prior to the decision.[6]

The CJEU decision has significance beyond the particular doctrine in question of exclusivity rebates, much the way that *GTE Sylvania* stands for more than just a move to rule of reason for non-price territorial restrictions in U.S. jurisprudence. First, the CJEU confirms that the mere decline in fortunes of competitors – or even their exclusion – may result from competition on the merits. Thus, it cannot therefore be assumed that the decline of competitors is a function of abusive conduct. Second, the judgment establishes that if a dominant firm submits evidence that its conduct is not capable of restricting competition (even for conduct previously thought of as *per se* abusive), the EC must assess all the circumstances to decide whether the conduct is abusive.

4 CJEU Judgment, para. 87.

5 See *Airtours plc v. Commission* (Airtours), Case T-342/99 EU:T:2002:146; *Schneider Electric v. Commission*, Case T-310/01 EU:T:2002:254; *Schneider Electric v. Commission*, Case T-77/02 EU:T:2002:255; *Tetra Laval B.V. v. Commission*, Case T-5/02 EU:T:2002:264; *Tetra Laval B.V. v. Commission*, Case T-80/02 EU:T:2002:265.

6 For an overview, see Gifford & Kudrle, The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy (2015).

IV. THE IMPORTANCE OF ECONOMIC EFFECTS

The singular focus on economic effects for competition law cases has improved consumer welfare from competition law. A focus on economic effects makes decisions more predictable and economically sound in a way that encourages investment and innovation in the economy.

Competition law across a number of jurisdictions has been immune from massive shifts in policy because, by making economic effects the sole factor for decision-making, the field has become technocratic. Nerds, the ultimate technocrats, are the champions of competition law and economics. In other areas of law and regulation, nerds (whether economists or lawyers) are bullied and marginalized, just like society at large.

The first jurisdiction to undertake an "antitrust revolution" based on economic analysis that led to a technocratic approach was the United States. Beginning in the 1970s, the United States transitioned from multiple goals in competition law to a singular goal based on economic effects. Yet, particular antitrust doctrines did not flip immediately starting with *Sylvania* towards an analysis based on effects. Rather, it was a gradual process that took a number of years across antitrust doctrines. Even in *Sylvania*, there is dicta that distinguishes non price vertical restraints from RPM, for which the Court was unwilling at that time to move to the rule of reason. It would take 30 years from *Sylvania* until *Leegin* to fix RPM case law and move minimum RPM from *per se* illegality to a rule of reason inquiry.[7]

At present, the U.S. Supreme Court treats competition law differently from other common law-like fields by ignoring *stare decisis* when economic thinking has changed. For example, the Court articulated in the recent *Kimble* case that "We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences."[8] The end result of an effects-based approach to competition authority enforcement and case law is that enforcement (rather than regulation) is guided by the sole goal of economic efficiency.

The implication of a singular efficiency based goal in the United States has been dramatic. Economic growth and competition in the United States is more significant than in Europe. The major innovations for technology and entrepreneurship are occurring in Silicon Valley, San Francisco, Seattle, New York City, Boston and Boulder and not in Paris, Athens, Milan and Frankfurt.

Can Europe become more efficient via an effects based competition policy and compete globally? With regard to mergers, EC competition law looks quite similar in analysis to Canada, the United States and other jurisdictions that make economic effects the sole factor for competition analysis. Indeed, the European Merger Regulation make the goal of consumer welfare explicit.[9] Speeches by prior Commissioners also show an express embrace of consumer welfare.[10]

However, this may be contrasted to some Article 101 and Article 102 competition law cases in which DG Competition has been more interventionist than the United States. At times in such cases, DG Competition is more aggressive in its legal theories and less rigorous in its economic analysis. This has penalizing conduct that is in reality pro-competitive. The highly capable economics team at DG Competition seems to wield less influence internally relative to its counterparts at DOJ and FTC. Such a situation is unfortunate as law and economics professionals must play an equal role for effective enforcement.

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7 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

8 135 S. Ct. 2401, 2412–13 (2015).

9 EUROPEAN COMM'N, EU COMPETITION LAW: RULES APPLICABLE TO MERGER CONTROL 184 (2010), available at: http://ec.europa.eu/competition/mergers/legislation/ merger_compilation.pdf.

10 Neelie Kroes, European Comm'r for Competition, European Competition Policy — Delivering Better Markets and Better Choices, Speech at the European Consumer and Competition Day (Sept. 15, 2005), available at: http://europa.eu/rapid/press-release_ SPEECH-05-512_en.pdf ("[A]im is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.")' Mario Monti, The Future for Competition Policy in the European Union, Merchant Taylor's Hall, London, 9 July 2001, available at: file:///C:/Users/ddsokol/Downloads/SPEECH-01-340_EN.pdf ("Actually, the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer.")

Intel offers hope that those forces within the Commission that take economic effects seriously will become further empowered to carefully work through complex cases to ensure that facts and economic analysis match up with legal theories to promote consumer welfare.

V. CONCLUSION

Better procedural fairness helps to reach the substantive goal of improved competition law enforcement. However, better procedural fairness also protects fundamental rights of parties and adds to the legitimacy of DG Competition. Without appropriate safeguards regarding transparency and due process, DG Competition risks its decision-making being perceived as illegitimate and part of the faceless bureaucracy for which there has been pushback across the continent.

On substantive law, *Intel* provides DG Competition an opportunity to move further in the direction of enforcement based on economic effects. Continental Europe (post Brexit) shows less innovation in terms of patenting or technology startup creation relative to other jurisdictions globally. This is due to a regulatory system that has multiple goals that discourages risk taking, entrepreneurship, innovation and economic growth. DG Competition can lead Europe in embracing competition and do what competition enforcers do best – step in when the market malfunctions. By following the principles in *Intel* and its own Guidance Paper, the EC can encourage innovation, competition, entrepreneurship and economic growth in Europe.