CRESSE: ACTUAL AND POTENTIAL EFFECTS

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CPI ANTITRUST CHRONICLE
OCTOBER 2018

I. INTRODUCTION

In antitrust law certain agreements or forms of conduct, e.g. price fixing, are treated as *per se* illegal. That means that the there is a broad consensus that the agreement or conduct is so anti-competitive that there is no need to examine its effects or the context in which it occurs in order to establish its illegality. This approach makes sense provided the conduct in question is so clearly anti-competitive that there can be no hesitation in condemning it. In such cases, strict, *per se* rules that require only establishing the existence of the conduct can both conserve enforcement resources and send a strong deterrent message.

Prior to the judgment of the European Court of Justice in the *Intel* case,[2] the European Commission and the Court of First Instance[3] took the position that, absent some overriding justification, exclusive rebates granted by a dominant firm were *per se* illegal.

In particular in its *Intel* judgment the General Court had taken the view that:

- it was not required to examine all the circumstances in order to assess whether Intel's exclusive rebates were likely to have a foreclosure effect;[4]
- there was no need to analyze actual effects or consumer harm to determine the anti-competitive effects of rebates conditioned on exclusivity or quasi-exclusivity, even in an *ex-post* case;[5]
- there was no need to establish a causal link between the alleged abuse and actual effects on the market,[6] or between the abuse and consumer harm;[7]
- there is no *de minimis* defense under Article 102.[8]

2 Judgment of September 6, 2017, *Intel v. Commission*, EU:C:2017:632

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

4 GC §§ 80-85.

5 Ibid § 103.

6 Ibid § 104.

7 Ibid § 105.

8 Ibid §§ 116-120.

The General Court also rejected the need for a price/cost test to determine whether the rebates had the potential to foreclose AMD.[9]

In its *Intel* judgment, the European Court of Justice rejected the General Court's approach and clarified EU law by ruling that, where the defendant submits evidence supporting a claim that its conduct was not capable of producing foreclosure effects,[10] the Commission is required to analyze not only the extent of the undertaking's dominant position, but also the part of the market covered by the challenged practice, the conditions under which the rebates are granted, their duration and amount, and the existence of a strategy to exclude an "as efficient" competitor.[11] The Court further held that, if the Commission uses the As Efficient Competitor Test (the "AEC test") to assess the capacity of the rebates to foreclose an equally efficient rival, then the General Court *"must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings"* about the rebates' capability to foreclose.[12]

The Court's approach represents a significant victory for those within DG Competition who have advocated for an effects-based approach to Article 102 and the use of the AEC test. It also serves as a case study on how not to bring about a fundamental change in the approach taken by a competition authority. If the Commission had used the AEC test to reject a complaint against a dominant firm and the Legal Service had then had to defend the Commission on appeal, it is likely that the Legal Service would have defended the use of the AEC test. Conversely, it is not that surprising that, in response to Intel's appeal, the Commission's Legal Service opted for a traditional line of defense which required only that it show that Intel had conditioned its rebates on exclusivity and which thus avoided both the need to show potential foreclosure effects and the complexities and uncertainties of the AEC test.

By clarifying the existing jurisprudence to require EU Courts and the Commission to examine the relevant circumstances in order to assess the likelihood of foreclosure even in those cases where rebates are conditioned on exclusivity (at least where the defendant has made credible arguments challenging the foreclosure effect of such rebates), the Court resolved the binary choice with which it was confronted, between the General Court which had rejected an effects-based approach and the Advocate General, who embraced it, in favor of the latter. Unfortunately, the Court did not go on to analyze any of the five factors it identified as being relevant to the analysis of the likelihood of foreclosure effects, ruling instead that the General Court's judgment should be annulled because it had failed to consider Intel's arguments challenging the Commission's application of the AEC test.[13] Thus, the Court's judgment rests on a procedural error, which obviated the need to consider additional factors, and in particular the extent of market coverage, that the Court had itself identified as requiring analysis.

The Court of Justice's approach towards the key issue of whether the facts are relevant in the case of rebates conditioned on exclusivity can also be characterized as procedural. Unlike the Advocate General, who provided a well-reasoned argument for treating exclusive and loyalty-inducing rebates in the same manner, the Court avoided both this issue and any discussion of the *Hoffmann-La Roche* jurisprudence[14] on which both the Commission and the General Court had relied to justify their *per se* approach. Rather, the Court's "*clarification*" of the existing case law seems to rest on a procedural point: where the defendant advances plausible arguments challenging the potential foreclosure effects of an exclusive rebate, the Commission and the Courts should examine them rather than refusing to consider them simply because the rebate was conditioned on exclusivity.

On its face, the Court's decision not to examine Intel's claim that 3,5 percent market coverage during the last two years of the infringement was insufficient for there to be any foreclosure effects (or to send this issue back to the General Court) appears odd. As in the case of Intel's claims about the misapplication of the AEC test, the General Court had not examined this issue – or rather had sought to avoid it by arguing that since Intel's conduct was part of a plan to exclude AMD, market coverage should be assessed over the entire infringement period (on the average 14 percent) and not for the last two years. This would seem to be the same type of procedural error as with the AEC test. However, it cannot

9 Ibid §§ 142-151. In its decision the Commission had applied the "as efficient competitor" test (the "AEC test") to determine whether AMD could supply the contestable part of customers' demand above cost and stated that the results of the AEC test corroborated its findings that Intel's discounts were exclusionary. In its judgment the General Court rejected the relevance of the AEC test in cases of both exclusive and loyalty-inducing discounts and declined to examine whether the test – which had taken up some 150 pages of the Commission's decision – had been properly applied.

10 Ibid § 138.

11 Ibid § 139.

12 Ibid § 141.

13 Ibid §§ 144 and 147–50.

14 Judgment of February 13, 1979, *Hoffmann-La Roche v. Commission*, 85/76, EU:C:1979:36.

be excluded that the Court's approach was influenced by its endorsement of the General Court's conclusion that Intel had engaged in a single continuous infringement because of its strategy to exclude AMD. In any event, by not referring the issue of market coverage back to the General Court, the Court avoided taking a direct position on whether there is a *de minimis* defense under Article 102, although its judgment would seem to suggest that such a defense does exist, notwithstanding the Court's rejection of such a defense in *Post Danmark II*.[15]

As can be seen from the foregoing discussion, the *Intel* judgment is something of a mixed bag. On the positive side, the judgment confirms that dominant firms may compete on the merits even if this results in the exclusion of less efficient competitors. Second, the Court has clarified that, even in the case of exclusive rebates, the Commission and the Courts need to examine the relevant circumstances to assess potential foreclosure effects, at least where the defendant has challenged the likelihood of foreclosure. Third, it reaffirms that the AEC test may be a useful tool in assessing the potential to foreclose, thus implicitly rejecting the General Court's conclusion that the AEC test is too lenient because it would permit conduct that makes market access more difficult. Fourth, the Court has identified five factors that should be examined in order to assess the potential to foreclose of a rebate conditioned on exclusivity, although it unfortunately declined to examine any of these factors in its judgment. Last, the Court breathed some life into the justification defense by noting that the same five factors to be assessed in determining potential foreclosing effects are also relevant for assessing whether rebates may be justified.

On the negative side, the Court did not directly address the most recent ECJ case rejecting a *de minimis* defense under Article 102.[16] It also accepted the concept of a single continuous infringement where there is a strategy to foreclose, and declined to consider whether rebates that cover only between 24 percent and 42 percent of an OEM's demand can be characterized as requiring that OEM to purchase all or most of its needs from the dominant firm.

But most significantly, the *Intel* judgment remains anchored in a world of potential, as opposed to actual, effects. This is highly significant because Intel's alleged infringements had all been concluded before the adoption of the Commission's decision in 2009. Indeed, in the case of Dell, perhaps the most important OEM, the infringement period ran from 2002-2005. Moreover, in 2006, Dell shifted a significant portion of its x86 CPU demand to AMD. That it had done so was a well-known fact before July 26, 2007 when the Commission issued its Statement of Objections, and before the oral hearing in May 2008 at which the merits of the Commission's approach to the AEC test were hotly debated. This means that, on the basis of the AEC test, the Commission concluded that Intel's rebates made it impossible for AMD to win sales to Dell, even though in 2006 Dell had already switched a significant volume of its CPU purchases to AMD. In other words, in 2007 the Commission used a predictive test to show that a shift in demand, which had occurred in 2006, was impossible. This surprising outcome raises the fundamental question of whether there is any scope for the application of predictive tests and the consideration of potential effects in cases where the abusive conduct has already occurred and where there is evidence – the actual switching conduct of an important customer – that establishes that a customer's demand can be shifted away from the dominant firm.

It would seem reasonable to argue that, where they are known, actual effects should be given precedence over potential effects when assessing exclusionary conduct.[17] In cases in which conduct is on-going and in which a regulator needs to decide whether to intervene, one can only rely on predictive tests or speculation as to likely effects. However, in cases in which the conduct has already come to an end actual effects should be discernable and measurable. In such a case, there is arguably no place for speculation or predictive tests since the outcome is already known. Indeed, such use of a predictive or speculative test could be analogous to reliance on a *per se* rule in that it can result in the condemnation of conduct without regard to its actual effects. Unfortunately, the Court of Justice never addressed this issue.

It was, however, extensively addressed by *Intel* in the Commission's administrative procedure. During the infringement period AMD had performed better than at any time in its history in terms of revenues, profitability and share growth. There was also evidence that when AMD had competitive products that outperformed Intel's, such as its chip for servers (known as Opteron), it gained market share despite substantial cash payments by Intel to OEMs who used its server chips. Conversely, there was also evidence that in key sectors AMD chips were inferior to Intel's. The Commission's answer to the argument about AMD's performance was that AMD would have done even better absent Intel's conduct – an assertion to which there is, of course, no effective response.

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15 Judgment of October 6, 2015, C-23/14, *Post Danmark A/S v. Konkurrenceradet*, EU:C:2015:651.

16 Ibid.

17 In its Guidance on the Commission's enforcement priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (commonly known as the "Guidance Paper") issued shortly before adoption of the *Intel* decision, the Commission notes, in para 20, 6th indent, that where, conduct has been in place for a sufficient period it may be possible to rely on evidence of actual foreclosure. OJ C 45/7 24 February, 2009 at p. 10. The Commission's comment identifies the utility of actual evidence but does not seek to attribute to it greater credibility.

The Court of Justice's reliance on potential effects in a case involving actual effects is troubling for two reasons. First, *Intel* was a case in which there were very sophisticated customers competing intensely downstream and for whom the price and performance of a major input like a CPU was critical to success in the market place. It was also a case in which customers had only two potential suppliers and, thus, would presumably be reluctant to support a foreclosure strategy that –if successful– would give rise to a monopoly. Indeed, there was extensive evidence that the OEMs continuously played Intel and AMD off against each other to get better pricing, but also that quality and performance were critical factors in the ultimate choice of a chip supplier. For example, as noted above, in the case of server chips where AMD had an arguably superior product, Intel's price reductions in the form of financial contributions to the OEMs that used its products were unable to prevent AMD from greatly expanding its market share in this sector. These facts raise serious questions about Intel's ability to foreclose AMD and the impact of its discounts on customer choice. Ignoring them in favor of predictive tests or speculation about potential effects seems unjustifiable and likely to yield false positives.

Second, the reliance on potential effects in an *ex-post* case suggests that the Court has not fully rejected the *per se* approach to exclusive rebates. While the requirement to show potential effects does loosen the noose of *per se* illegality, it creates a half-way house to the extent it does not fully embrace the decisiveness of actual (as opposed to likely) outcomes in *ex-post* cases. In theory, such an approach might be justified on policy grounds if the goal were to deter even attempts at foreclosure, regardless of whether they actually succeed. However, this approach was implicitly rejected by the Court of Justice in *Intel*. For although the Court did agree with the General Court that Intel's conduct had been in execution of a strategy to foreclose AMD, it nevertheless remanded the case to the General Court so that Intel's claims about the flawed application of the AEC could be examined. If the existence of a strategy to foreclose were sufficient to infringe Article 102 the Court would not have taken this step. This is clearly positive. However, the result is that the Court of Justice has now asked the General Court to review Intel's claims about how the AEC test was applied where, in at least one case – Dell – we know that the AEC test failed to predict what actually happened.

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