INFORMATIVE NOTE

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EU AND COMPETITION LAW

# THE *INTEL* CASE

*On 12 June 2014, the General Court issued its highly anticipated judgement on the Intel case, the first judicial test of the effects-based approach applied to Article 102 TFEU cases, following the Commission's 2009 Guidance Paper , in which the latter favoured said approach over the more formalistic one that ensues from the Courts' case law.*

On 12 June 2014, the General Court issued its highly anticipated judgement on the *Intel*[1] case, the first judicial test of the effects-based approach applied to Article 102 TFEU cases, following the Commission's 2009 Guidance Paper[2], in which the latter favoured said approach over the more formalistic one that ensues from the Courts' case law.

The case concerned alleged exclusivity rebates granted to computer manufacturers by *Intel*, as well as several 'naked restrictions', with the alleged aim of excluding AMD, its major competitor, from the market for x86 CPU microprocessors.

The Commission had used in its decision – and for the first time in an Article 102 TFEU case – the effects-based approach set forth by the aforementioned Guidance Paper, applying the so-called 'as efficient competitor test'. This test aims at establishing whether an equally efficient competitor would have been able to compete against the dominant undertaking for the contestable share of the market, i.e., whether it would have been able to offer its products at a price that compensated the customer for the loss of the dominant undertaking's rebate. Given that, in this instance, such a competitor would have to sell its products below cost, the Commission concluded that *Intel* was abusing its dominant position.

1 Case T-286/09, Intel Corp. v Commission, [2014], not yet published.

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 2009, C 45/7.

However, the Court's judgement did not apply the effects-based approach as per the Commission's Guidance Paper and reaffirmed the formalistic approach in *Hoffmann-La Roche*[3]. In fact, the Court deemed the effects-based approach to be ultimately irrelevant for the case at hand, since in any case exclusivity rebates such as those analysed in this instance are presumed to constitute an abuse of dominant position, given their foreclosure effect.

3 Case 85/76, Hoffmann-La Roche v Commission, [1979], ECR-461.

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The Court then drew a distinction between three types of rebates:

(i) Quantity rebates, presumed to be legal because the rebate results from cost savings which are passed on to the customer;

(ii) Exclusivity rebates or fidelity rebates within the meaning of *Hoffmann-La Roche*, which include quasi-exclusivity, are presumed illegal. This presumption is rebuttable under "exceptional circumstances", which seems to indicate it will be extremely difficult to prove their pro-competitive effect;

(iii) Other rebates, including individualised rebates, retroactive rebates and, in general, all rebates that fall short of quasi-exclusivity, in which the specific circumstances of the case have to be taken into account in order to decide whether there is an abuse of a dominant position.

The third category of rebates mentioned hereinabove seems to leave room for the application of the effects-based approach, as such rebates are analysed on a case by case basis. Nevertheless, this aspect needs to be clarified by future case law.

Finally, it should be noted that the fact that the 2009 Guidance Paper was deemed not applicable as such by the Court – because the Commission's investigation had started before its publication – also leaves room for the Court to review its current formalistic approach in future cases.

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