



# The Intel judgment and its implications

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# Background

- According to early case law (*Hoffmann-La Roche*) exclusivity rebates considered anticompetitive unless objectively justified
- Late 90s: policy orientation towards an effects-based assessment
- First decade of 2000: assessing the harmful effects of unilateral conduct as a matter of priority
- The 2009 Commission Decision in Intel found exclusivity rebates abusive
  - 1) on the basis of Hoffmann-La Roche case law
  - 2) in addition the Commission:
    - a) carried out a qualitative and quantitative assessment of potential effects of the rebates and
    - b) applied an "as efficient competitor" test (AECT)

# General Court's judgment (2014)

- Upheld the Commission decision entirely
- Established 3 categories of rebates:
  - Volume based (presumed lawful)
  - Exclusivity rebates (presumed unlawful subject to objective justifications)
  - Others: assessment of "all circumstances of the case" necessary, but no AECT
- Intel's rebates presumed unlawful, however, "for the sake of completeness" the GC considered the qualitative and quantitative assessment of potential effects in the Commission decision and found that they indeed showed harm to competition
- The GC's ruling did not assess the Commission's application of the AECT

# The Court of Justice's judgment (2017)

- Set aside the General Court's ruling
  - Indicated in what circumstances the potential effects of exclusivity rebates need to be analysed
  
- Referred the case back to the GC to examine all Intel's arguments concerning the AECT applied by the Commission
- Did not assess and did not take a view on the legality of the Commission Decision
  
- Rejected Intel's pleas on:
  - Lack of jurisdiction of the Commission
  - Alleged breach of Intel's rights of defence

# Key paragraphs of the judgment

- Art 102 does not seek to ensure that competitors less efficient than the dominant should remain on the market **§133**
- Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation **§134**
- *Hoffmann –La Roche* is still relevant law **§137**
- But it needs to be further clarified where the dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition **§138**

# Key paragraphs of the judgment

- In that case, the Commission is required to analyse the extent of the undertaking's dominant position, the share of the market covered by the challenged practice, the conditions and arrangements for granting the rebates in question, their duration, their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking **§139**
- Balancing of the favourable and unfavourable effects of the practice in question can be carried out only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking **§140**

# The presumption

- Court has clarified the Hoffmann-La Roche case-law: presumption that exclusivity rebates by a dominant undertaking constitute an abuse.
  
- Dominant undertaking can submit in the administrative procedure that its conduct was not capable of restricting competition. The authority then must:
  - assess this 'rebuttal' and its merits and, if needed,
  - analyse the intrinsic capacity of that scheme to foreclose an as efficient competitor
  
- Threshold for a successful rebuttal of that presumption:
  - Dominant undertaking has the burden of challenging the capability of its rebate arrangement to produce foreclosure effects.
  - Case-specific rebuttal based on concrete evidence: abstract and theoretical arguments are not sufficient
  - The amount of evidence needed for a successful rebuttal depends on market circumstances and the rebate scheme

# Capacity to foreclose

- Test = "*intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking*"
- The Intel judgment has thus clarified what we need to show and when. It does not exhaustively prescribe how this should be done.
- The evidence, methods and tools the Commission should rely on will depend on the circumstances of each case:
  - Assessment of all relevant circumstances including the criteria specified by the Court of Justice: Degree of dominance, market coverage, conditions/arrangements for granting rebates, their duration & amount and possible existence of a foreclosure strategy against AEC
  - No requirement for performing the specific AECT under all circumstances, it is therefore possible, depending on the specifics of the case, to
    - rely on purely qualitative assessment, or
    - apply a full-fledged or simplified (depending on the circumstances) AECT

# A recent example: Qualcomm

- The market: LTE baseband chipsets that enable smartphones and tablets to connect to cellular networks and are used both for voice and data transmission
- Qualcomm is by far the world's largest supplier of LTE baseband chipsets. Qualcomm held a dominant position in the global market for LTE baseband chipsets over the period investigated (i.e. between at least 2011 and 2016)
- Qualcomm's practice:
  - in 2011, Qualcomm signed an agreement with Apple, committing to make significant payments to Apple on condition that the company would exclusively use Qualcomm chipsets in its "iPhone" and "iPad" devices. In 2013, the term of the agreement was extended to the end of 2016.
  - Qualcomm's rivals were denied the possibility to compete effectively for Apple's significant business, no matter how good their products were

# Qualcomm's abuse

- Qualcomm has abused its market dominance by preventing rivals from competing in the market.
  - It did so by making significant payments to a key customer on condition that it would exclusively use Qualcomm chipsets.
  - The concern of such an arrangement is that the exclusivity condition denies rivals the possibility to compete and consumers and competition have suffered as a result of Qualcomm's conduct.
  - No issue with the payment, the issue is with the exclusivity condition
  - On this basis, the Commission concluded that Qualcomm's illegal practice had a significant detrimental impact on competition. It excluded rivals from the market and deprived European consumers of genuine choice and innovation.
  - The fine amounted to € 997 439 000 and the duration of the infringement established in the decision is five years, six months and 23 days.

# The supporting evidence

- Based on a variety of qualitative and quantitative evidence:
  - the extent of Qualcomm's dominant position;
  - the significant amounts paid by Qualcomm in exchange for exclusivity;
  - a broad range of contemporaneous evidence (including Apple's internal documents) that Qualcomm's payments reduced Apple's incentives to switch to rivals;
  - the importance of Apple as a customer in the market for LTE baseband chipset suppliers: Apple accounts for a significant share of LTE chipset demand. Apple is also a leading smartphone and tablet manufacturer, which can influence other customers' and manufacturers' procurement and design choices. By making sure that rivals had no chance to compete for any of Apple's important business, Qualcomm's conduct had an effect on the LTE baseband chipset market as a whole;
  - Qualcomm did not demonstrate that the exclusivity condition created any efficiencies, which could have justified Qualcomm's practices.
  - Rejection of the "price-cost" test submitted by Qualcomm. The results of this test failed to support Qualcomm's claim that its exclusivity payments were not capable of having anti-competitive effects.

# Consequences and practice

- The Court changed the previous "by nature" abusive qualification of exclusivity rebates into what could be called "rebuttable presumption" and clarified the framework for the analysis of potential effects (when this is needed).
- Prescribes a framework of analysis but did not prescribe the use of particular evidence or a particular test (such as the AECT)
- The judgement has a limited impact on the Commission's investigations because:
  - the Commission was anyway engaging with dominant firms' arguments
  - the Commission's Article 102 cases over the last ten to fifteen years always showed anti-competitive capabilities