

The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?

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This article analyses the judgment¹ issued by the General Court of the European Union ('GC') in the *Intel* case, which had earlier been the subject of a decision² adopted by the European Commission ('EC').

The judgment raises a number of issues which cannot all be analysed here.³ In this paper, I concentrate on one question which, to me, appears important in the discussions surrounding the application of Article 102 TFEU—that is, what exactly is required for a practice to be considered illegal under that provision?

I. More economic approach

In the early 2000s, the EC undertook to better substantiate, with economic arguments, the decisions it adopted in applying competition law. Officially, that resolution followed a series of setbacks the Commission suffered before the European Courts, which annulled several earlier decisions for lack of justification. A more contextual explanation is that the DG in charge of competition then came under the control of an economist⁴ later followed by another one. During their eleven years (in total) at the helm of DG COMP, both sought to remodel European competition law on ideas expressed in currently dominant economic theories.⁵

In the context of dominance, the move resulted in the adoption of the Communication from the Commission, Guidance on its enforcement priorities in applying

Key Points

- In *Intel*, the General Court confirms the jurisprudence considering as inherently illegal the provision of financial advantages by dominant firms in exchange for exclusivity commitments, as part of a fidelity-enhancing mechanism or in exchange for a commitment to restrict the sale of competing products.
- This ruling casts doubt on the viability of the idea, central in the Guidance Paper on Article 102 TFEU, that in order to bring an action against dominant companies, it is necessary to establish with the assistance of specific economic models the existence of a concrete, negative harm caused to consumers.

Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings—hereinafter 'Guidance Paper'.⁶ Officially, the Guidance Paper expresses priorities to be followed in the enforcement of Article 102 TFEU. Reading between the lines, it suggests or seeks to encourage a possible evolution of the Commission's approach at that time.

In the Guidance Paper, this approach is presented as producing situations where action is undertaken against companies for behaviour which, despite appearances, is procompetitive and deserves applause rather than sanc-

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1 Case T-286/09 *Intel Corp. v European Commission* [2005] not yet reported. ('Ruling').

2 Commission decision C(2009) 3726 final relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement [2009] Case COMP/C-3/37.990-*Intel*). ('Decision')

3 For an analysis of procedural issues raised by the case, see James Venit, 'The *Intel* Judgment, File Access and Confidentiality in EU Competition Cases – Has the Time Come for Reform?' (submitted, 2014) *Journal of European Competition Law and Practice*.

4 Mario Monti—Commissioner for competition from 1999 to 2004—followed by Nelly Kroes (2004–2010).

5 Several publications deal with this evolution—see a.o. Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid* (Kluwer Law International, Alphen aan den Rijn NL 2011); Josef Drexler, Wolfgang Kerber and Rupprecht Podzun (eds), *Competition Policy and the Economic Approach* (Edward Elgar, Cheltenham UK 2011); Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar, Cheltenham UK 2012).

6 OJ C 45 2009, pp 7–20. Among the many publications, see Giorgio Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1:1 *Journal of European Competition Law and Practice* 2–11; Ekaterina Rousseva and Mel Marquis, 'Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU' (2013) 4:1 *Journal of European Competition Law and Practice* 32–50.

tions. To avoid such negative results, the Guidance Paper proposes limiting competition enforcement in dominance cases to situations where it is possible to establish, with the assistance of specific economic tools, the existence of concrete, negative effects on consumers (consumer harm).

II. The decision in *Intel*

It is against this background that the Decision was adopted as part of a dispute between US chip manufacturers Intel and Advanced Micro Devices (AMD).⁷ The contention made by the latter was that Intel was abusing its dominant position through exclusionary practices. In the Decision, the market was defined as encompassing a specific category of chips—x86 CPUs. Intel was found to be dominant due to its very large and stable market share (80%). This arose from, *inter alia*, the existence of barriers to entry and expansion, making it unlikely for competitors to constitute a credible threat to the dominant firm. Three practices were deemed abusive, namely

1. the provision of rebates to various original equipment manufacturers (OEMs)⁸ in exchange for a commitment that they purchase all (or at least a significant part) of their orders from Intel;
2. the provision of financial advantages to a distributor⁹ in exchange for a commitment to sell Intel products exclusively; and
3. the provision of financial advantages to some OEMs¹⁰ in exchange for a commitment to cancel, delay, or restrict the sale of specific equipment they had already produced using chips made by competitor AMD.

According to the Commission's Decision, these practices formed part of a comprehensive strategy aimed at foreclosing AMD from entire segments of OEM demand (practice 1 above) and from specific product or sale channels (practice 3). The strategy was that, in the event

OEMs used AMD chips despite these commitments, their products would not be sold through an appropriate distribution channel (practice 2).

For the Commission, the nature of the advantages (rebates or payments) provided in exchange for exclusivity was not relevant—the material aspect being that an advantage was provided in exchange for an obligation not to deal with competitors.¹¹

Similarly, the Commission did not find it relevant whether all orders or only part of them were reserved to the dominant firm, and it did not determine what proportion of orders was sufficient.¹² In both situations, the case law calls these advantages 'fidelity' rebates. That term reflects the behaviour expected from clients for the part of the orders designated by the dominant firm. For the GC, these advantages can all be called 'exclusivity' rebates when they concern all or nearly all orders.¹³

III. The ruling examined

In the judgment, the GC finds to be illegal the exclusivity-based advantages conferred by the dominant firms to OEMs and to the distributor, MSH. Such advantages involve the two first practices described in the paragraph above. For the GC, they are inherently anticompetitive. By nature, they seek to impede clients from dealing with competitors—and must be, for that reason, prohibited.¹⁴

The same applies for the third type of practice identified above—a practice whereby, in exchange for payments, Intel was requesting OEMs to cancel, delay, or restrict the sale of specific products equipped with AMD chips. For the GC, that practice must be distinguished from the other ones in that it does not relate directly to a promise of exclusivity. Rather, it has a fidelity-building character in specific contexts.¹⁵ Under existing case law, that feature

7 In the literature, see Nicholas Banasevic and Per Hellstrom, 'When the Chips are Down: Some Reflections on the European Commission's Intel Decision' (2010) 1:4 Journal of European Competition Law and Practice 301–10; Damien Gérardin, 'The Decision of the Commission of 13 May 2009 in the *Intel* Case: Where Is the Foreclosure and Consumer Harm?' (2010) 1:2 Journal of European Competition Law and Practice 112–22. On the procedures opened against Intel in the USA, see Patrick DeGraba and John Simpson, 'Loyalty Discounts and Theories of Harm in the Intel Investigations' (2014) 2:1 Journal of Antitrust Enforcement 170–202.

8 Dell, Lenovo, HP, NEC.

9 Media-Saturn-Holding GmbH ('MSH').

10 HP, Acer, Lenovo.

11 Decision, para 926 s. See also Ruling, para 29.

12 No indication is provided on the ratio of orders necessary to apply the prohibition—and the terminology used in the Decision or the Ruling is not always consistent. In the decision adopted by the Commission, references to 'all' orders, 'nearly all' of them, 'most' of them and the 'main part' of them can be found. (See eg paras 920 and 924 of the decision). In the French version of its judgment, the GC qualifies advantages as exclusivity based where they concern 'une partie importante [des] besoins' (Para 76).

For rebates or payments listed in point 1 above: Dell and Lenovo were to reserve 100 per cent of their orders to the dominant firm (resp. para 977 and 987 of the decision), HP was to purchase 95 per cent of its needs from Intel (para 951) and NEC 80 per cent (para 981). Under the contract signed with Intel, distributor MSH could not sell computers equipped with AMD chips (exclusivity, para 992 of the decision).

13 On rebates, see Luc Peepkron and Ekaterina Rousseva, 'Article 102 TFEU: Exclusive Dealing and Rebates' (2011) 2:1 Journal of European Competition Law and Practice 36–8; Giulio Federico, 'The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach' (2011) 2:3 Journal of European Competition Law and Practice 277–84; Hans Zenger, 'Loyalty Rebates and the Competitive Process' (2012) 8:4 Journal of Competition Law and Economics 717–68; Gianluca Faella, 'The Antitrust Assessment of Loyalty Discounts and Rebates' (2008) 4:2 Journal of Competition Law and Economics 375–410; Denis Waelbroeck, 'Michelin II: A Per Se Rule Against Rebates by Dominant Companies?' (2005) 1:1 Journal of Competition Law and Economics 149–71.

14 On the legal standard applicable to exclusivity rebates, see Ruling, para 76, 79–81 and 85–93.

15 Ruling, para 78.

implies that a ruling of illegality can only be made in relation to these rebates after a full examination of the facts.

However, this does not imply that a different sort of standard must apply to that third practice. For the GC, the three types of behaviour referred to above must be subject to the same treatment. They are illegal where they have the capacity to restrict competition. For none of these practices is there a need to establish concrete effects, using specific quantitative tools.¹⁶ As regards the third type of practice, the condition is fulfilled because by entering into agreement with OEMs, the dominant company indeed sought to eliminate the ability of OEMs to deal with a competitor (AMD) for the product lines mentioned in the agreement.¹⁷

In deciding so, the GC confirms the jurisprudence dividing rebates from dominant firms into the following categories:¹⁸

- Rebates based on quantity—such rebates can be accepted as they do not have as their object or effect the limitation of access to competitors but only divide advantages accruing from economies of scale between the firm and its clients.
- Rebates provided in exchange for exclusivity—on dominated markets, these rebates are automatically illegal when provided by the dominant firm; there is no need to examine the effects of the conduct before coming to that conclusion.
- Rebates granted in a way that, although they are not granted explicitly in exchange of a promise of exclusivity, exert on clients a pressure not to deal with competitors or not to deal with them as much as they would have done otherwise. Such advantages—which are called ‘naked restrictions’ by the Commission and the GC—are illegal when the existence of that pressure can be established.

IV. Legal standard

For the GC, there is no need to establish, with the assistance of specific economic tools, a concrete effect before

considering that a practice is abusive.¹⁹ It is sufficient if it is merely capable of producing an effect. In the context examined here, that requirement is automatically satisfied with exclusivity rebates. As their object is the imposition of an obligation not to deal with competitors, these rebates, when provided by dominant firms, are capable of distorting competition.

‘[E]xclusivity rebates granted by an undertaking in a dominant position are by their very nature *capable* of restricting competition’. ‘The *capability* of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates.’²⁰ ‘[E]xclusivity rebates granted by an undertaking in a dominant position are by their very nature *capable* of foreclosing competitors.’²¹ ‘[T]he circumstance claimed by the applicant that customers bought exclusively from it for business reasons which were entirely independent of the rebates, assuming that it were proved, does not mean that those rebates were not *capable* of inducing customers to obtain their supplies exclusively from it.’²²

The same applies for other rebates when, after an examination of facts, it appears that they have a fidelity-enhancing nature.

‘[E]ven in the context of an analysis of the circumstances of the case, the Commission must only show that a practice is *capable* of restricting competition.’²³

A corollary is that quantitative tools measuring the effects of practices are not necessary for the application of the prohibition. For example, the ‘as-efficient-competitor’ test, which seeks to determine whether a competitor must sell at a loss to match rebates provided by the dominant firm,²⁴ is considered useless by the GC in the rebate context. It purports to measure a reality that does not have to be demonstrated for the prohibition to apply.²⁵

The Ruling contains comprehensive discussions about the consistency between that approach and cases decided by European courts on rebates provided by dominant firms.²⁶ For the sake of conciseness, these discussions cannot all be examined in detail in this paper. I leave it to other authors to analyse the specific relationship of

16 That approach is different from the one followed the Decision, where the Commission devotes 10 pages out of a total of 517 to a practice which it terms ‘naked restriction’. For the Commission, there is no reason to treat the various practices differently. In its Decision, the Commission does not even mention the question whether circumstances should be analysed before concluding that an abuse has been committed.

17 On the legal standard applicable to fidelity-enhancing mechanisms, see Ruling, paras 78, 82–4 and 198–220.

18 Ruling, paras 75–8.

19 Para 104: ‘[I]t is not necessary to prove actual effects of the rebates’.

20 Ruling, para 85 (emphasis added).

21 Ruling, para 87 (emphasis added).

22 Ruling, para 104 (emphasis added).

23 Ruling, para 103 (emphasis added).

24 That conclusion can be reached where the result given by the test is negative.

25 That quantitative tool was used by the dominant firm during the procedure before the Commission, and the proceeding before the GC. One hundred and fifty pages are devoted, in the to a contradiction, by the Commission, of these arguments. Such Decision, and the response provided by the Commission, are not examined by the GC in the Ruling.

26 The main cases decided by the Court of justice, and quoted in the Ruling, are, in reverse chronological order: Case C-549/10 *P Tomra Systems e.a. v Commission* [2012] not yet reported; Case 85/76 *Hoffmann-La Roche v*

the Ruling with one or another of these rebate-related decisions and judgments.

To me, what is more interesting is the link that can be established with cases involving other anticompetitive restrictions. In some of these cases, the European courts engage in a path similar to the one examined here—they elaborate on the reasons why they consider that these practices can and should be deemed illegal irrespective of detailed demonstrations based on given economic models, once it has been determined they are capable of producing an anticompetitive effect.

In that context, special attention must be devoted to *France Telecom v Commission (Wanadoo)*, where the dominant telecom operator was challenged for allegedly selling internet access services at a loss.²⁷ Before the European Courts, the firm was arguing that, by themselves, low prices cannot be deemed illegal. Indeed, they do not harm consumers—on the contrary, consumers should be very satisfied with low tariffs. For the dominant firm, the only situation where action could be taken against sales at a loss is where there is a reasonable possibility that a dominant firm can raise prices beyond competitive levels after competition has been eliminated. In the absence of such a possibility, consumers would not suffer harm—and the practice would not cause any negative effect deserving action by competition authorities.

According to the national operator France Telecom, it would not be possible to recoup the loss through future price rises because the barriers to entry were low in the relevant market. Simply the possibility of entry on such a market is significant. France Telecom argued that to avoid creating a situation where competitors would be attracted to enter the market, it was compelled to maintain tariffs at a low level—a very positive outcome for consumers.²⁸

For the dominant firm, there was no possibility, in that context, that the allegedly abusive practice would produce any form of negative effect even though, in itself, it certainly had the potential to cause damage. In support of that contention, the firm presented economic intelligence stating that prices would not go up after existing competitors had been removed.

Confronted with this evidence, the Commission undertook to contradict, ‘for the sake of completeness’, the economic analysis presented by the firm. But it also asserted that, as a matter of principle, negative effects need not be established, using specific economic tools, for it to conclude that an abuse has been committed.

As in *Intel*, the European courts found that findings of abuse did not depend on the existence of concrete anticompetitive effects. For them, exclusionary practices are abusive when they have the capacity to exclude even if the intended result is not achieved—in whole or in part. The absence of negative consequences on the situation of competitors is not relevant. In *Wanadoo*, this meant that the presence or the absence of a possibility to recoup losses did not have to be considered.

‘[W]here an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position.’²⁹ ‘[C]ontrary to what the appellant claims, it does not follow from the case-law . . . that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive.’³⁰

The debate whether the application of competition law should depend on specific quantitative evidence is not limited to Article 102 TFUE but also affects the application of Article 101 TFUE. For instance, in *Glaxo*, the Commission was confronted by an undertaking hindering parallel commerce by charging higher prices for products probably meant by clients for re-exportation in other countries where prices were higher. In conformity with case law, the behaviour was deemed illegal by the Commission on the ground that it was hindering parallel commerce. Upon review, the GC accepted the representation made by the firm that the existence of a concrete harm to consumers should be established using specific quantitative models before applying the prohibition. However, that ruling was quashed by the CJEU, which considered that practices aiming at hindering parallel com-

Commission [1979] ECR 461; C-95/04 P *British Airways v Commission* [2007] ECR I-2331; Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461 (‘Michelin I’). In the GC rulings, see Case T-203/01, *Michelin v Commission*, ECR II-4071 (‘Michelin II’). These rulings were issued in procedures regarding decisions adopted by the Commission.

27 Case T-340/03 *France Telecom SA v Commission* [2007] ECR II-107. Case C-202/07 *France Telecom SA v Commission* [2009] ECR I-2369. Commission decision relating to a proceeding under Article 82 [EC] (Case COMP/38.233—*Wanadoo Interactive*) [2009], hereinafter ‘*Wanadoo*’.

28 Technically, that argument was not compatible with the finding that the firm was dominant on the relevant market. In European competition law, dominance designates a situation where, for a variety of reasons, a firm has become able to behave without taking consumers or competitors into account. A power of that nature is not possible on markets with low entry barriers, which involve a constant threat of entry. *Wanadoo*, CJ ruling, para 102.

29 *Wanadoo*, ruling of the GC, para 196. The same sentence appears in the Ruling, para 196.

30 *Wanadoo*, ruling of the Court of justice, para 110.

merce are illegal irrespective of such a demonstration—and thereby hinted that it was not ready to alter its case law on this point.³¹

‘With respect to the Court of First Instance’s statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position. First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.’³²

V. Three major ideas

These cases indicate that: (a) the European courts are under pressure to alter their jurisprudence on abuse in a way that would restrict the number of situations in which in which action can be taken by competition authorities; and (b) so far, they have refused to accept the arguments presented to that effect by the parties—all prosecuted for antitrust violations—and, to a certain extent, by the European Commission.

Will they continue to resist? The question is on everyone’s minds. Instead of making predictions, I would suggest to re-examine, again, the reasoning articulated by the European courts in a hope to better understand the core of their approach.

In the context of Article 102 TFEU, their reasoning is centred around three ideas, which are reported in the Ruling as being the reasons why the notion of abuse is defined the way it is in European competition law. The first idea is that as a result of the position held on dominated markets, dominant firms cannot be allowed to tie

purchasers—that is, compel them to adopt behaviour they would not adopt otherwise.³³ That idea focusses on the ‘imposition of a constraint’. As a result of that constraint, purchasers are deprived of their ability to choose the products and services which, in their judgment, correspond to their needs. Moreover, competitors no longer have the possibility of effectively presenting their products/services to clients because, in the market concerned, items are no longer chosen on the basis of criteria generally used on competitive markets: price, quality, innovation.³⁴

The second idea is that although they can produce positive results, exclusivity commitments are not compatible with the special responsibility entrusted to dominant firms on dominated markets not to engage in behaviour that leads to the further deterioration of the existing level of competition. That idea focusses on ‘market conditions’—the characteristics of the market where the behaviour takes place. On that market, a firm has built a position of economic strength where, for a variety of reasons, it can no longer be challenged by competitors in any meaningful way. In the activities concerned, the pressure inherent to competition has thus ceased to exist—taking away, in large part, the incentive pushing firms to constantly improve their price, quality, and capacity to innovate. In that context, accepting an additional interference with the structure of competition cannot be accepted.³⁵

A third idea is more technical and concerns the specific situation of ‘competitors’ seeking to attract clients provided with exclusivity or fidelity-raising rebates by a dominant firm. To sell products or services, these competitors must propose discounts which compensate the loss, for clients, of the rebates promised by the dominant firm on all orders contemplated in the arrangement with the latter. Under case law, that difficulty is inherent to such rebates and demonstrates that financial advantages of that nature make it more difficult for competitors to enter markets and expand.³⁶

VI. Complementary perspectives

The three ideas discussed above correspond, in fact, to different angles or perspectives from which the situation of the various actors can be explored in the context of domi-

31 Case C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291. Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969. Commission decision 2001/79/EC relating to a proceeding pursuant to Article 81 of the EC Treaty (Cases IV/36.957/F3 Glaxo Wellcome (notification), IV/36.997/F3 Aseprofar and Fedifar (complaint), IV/37.121.F3 Spain Pharma (complaint), IV/37.138/F3 (complaint) and IV/37.380/F3 EAEPC (complaint) OJ 2001 L 302, p. 1.

32 Ruling of the Court, paras 62 and 63.

33 Ruling, paras 72 and 73.

34 Ruling, paras 72 and 73. As indicated in the Ruling, action must be taken on exclusivity rebates provided by the dominant firm irrespective of: the circumstances under which the constraint is imposed (unilaterally by the dominant firm or through a contract with purchasers); the identity of the party taking the initiative (dominant firm or purchasers); the method used to impose the constraint (formal obligation or provision of advantages); and the size of purchasers (the only material aspect being the ratio reserved by each client to the dominant firm).

35 Ruling, para 90.

36 Ruling, para 88.

nated markets. The first idea focuses on the special responsibility of 'dominant firms'. This responsibility means that these firms must refrain from actions which may bring about a supplementary, negative, undesired effect. In themselves, these actions may be legitimate. For instance, these actions may be practices perfectly acceptable from an ethical point of view and frequently used by businesses on competitive markets. But the fact that they take place in a dominated market, and are adopted by dominant firms, causes them to fall under the prohibition because of the effect they are capable of producing on competition.

The second idea takes up the angle of another category of players—'clients', or 'purchasers'. In the rebate context, those purchasers are provided advantages to the extent they accept not to deal with competitors. In some instances, their deprivation of liberty may come from formal obligations imposed by dominant firms. But their freedom may also be altered by material circumstances—ie when the advantages provided by dominant firm mean clients lose any interest in exercising the liberty they normally have to turn to another supplier if they are dissatisfied.

The last idea adopts the perspective of 'competitors'. The focus is placed on the difficulties faced by these players when they seek to attract clients on dominated markets where exclusivity or fidelity-enhancing rebates are provided. In such situations, attracting clients would require them to offer purchasers advantages which are out of reach with their own financial capabilities. Indeed, these discounts need to match the entirety of the rebate promised by the dominant firm on the whole range of products concerned by the financial advantages. Competitors to a dominant firm do not have the financial power to do so as they are weaker.

VII. Underlying rationale

All these ideas and perspectives are centred around the notion of dominance. In the case law, 'dominance' is defined as a position of strength allowing a firm to

behave independently of consumers and competitors. When it dominates a market, a firm is able to set the conditions it sees fit for itself, without having to consider any form of possible reaction or interference by consumers,³⁷ or by competitors.³⁸

A firm which possesses such power has the capacity to hurt. It is, for example, in a position to tie purchasers and make it unnecessary for them to deal with competitors.³⁹ Moreover, it possesses an array of tools empowering it to harm competitors—that is, to weaken or even eliminate some or all of them, partially or even entirely. For example, as a result of their strength, dominant firms have the capacity to launch price wars. Or they can deny access to resources necessary to manufacture products or design services. In that sort of situation, the fate of competitors is hopeless. They cannot win, because they are much weaker.⁴⁰

To illustrate this, take a market dominated by a certain firm. As we characterise that firm as being dominant, we must accept that that firm has the capacity to hurt competition.⁴¹ On the facts, it appears that that firm is engaging in behaviour which has, as its object, the restriction of competition. In the context of dominance, that practice will normally produce the effect it is intended to produce. When it is adopted by a firm which has the capacity to restrict competition, a practice seeking that objective is likely to bring about the effects it is intended to produce.

This is what the European courts are referring to when they state that, if a practice seeking to hurt competition is adopted by a dominant firm, that is, by a firm capable of harming competition, it will normally produce that effect. The consequence of that syllogism is that when considering dominant firm practices under European Competition Law, there is no need to provide evidence of effects, with the assistance of specific economic tools, or even to investigate, with such tools, whether effects have been produced.

'If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.'⁴²

37 Which, on competitive markets, have the ability to turn to another supplier when they are not satisfied by the products or services provided by their supplier or partner.

38 Which, on competitive markets, have the possibility to attract dissatisfied clients by lowering prices, increasing output, improving quality or innovating?

39 As a reminder, purchasers on dominated markets are not free to seek alternative partners when they are not satisfied by the products or services provided by the dominant firm. The firm has become unavoidable trading partner.

40 Not only has a dominant firm the capacity to eliminate competition—it also has, where it is not prevented from doing so, powerful incentives to

engage in such practices. On markets, the business imperative is to attract clients and business partners. Firms must do whatever is necessary to ensure that the products and services they propose will be preferred to those prepared by competing entities. One way to achieve that goal is to convince purchasers that they should come to the firm rather than to competitors. Another is to eliminate the alternatives to which purchasers could go if they were unsatisfied.

41 As indicated, that is part of the definition—a dominant firm is an undertaking which, among others, has the capacity to hurt and even eliminate competition. In European competition law, a firm that does not have that capacity cannot be considered dominant.

42 Ruling, para 195.

VIII. Terminology

At this stage, it is necessary to seek definitions of the terms used in the debate—while asking experienced readers to excuse the basic character of this reminder.⁴³ So far, the discussion has concentrated on the idea that behaviour could restrict competition by its ‘effect’. By this latter term, it is referred to anticompetitive consequences that may result from behaviour adopted by a dominant firm. An assessment of the effects of a practice seeks to determine whether the degree of rivalry between firms has increased or decreased on a given market as a result of this practice.

Some activities may restrict competition by ‘object’. Where it is used, the latter expression refers to the aim or goal the author of the behaviour sought to achieve in adopting a practice.

In various circles, it is contended that the European jurisprudence favours a *per se* approach. That term refers to terminology developed in the USA where two standards exist for the assessment of practices. One is the ‘rule of reason’, where before concluding that a practice is illegal, judges and authorities must examine all circumstances of a case, quantify the anticompetitive effects produced by the practice, do the same for possible pro-competitive effects associated with it, compare these two categories of effects and, on that basis, finally decide—where it appears from this examination that there is a clear preponderance of anticompetitive effects—that the practice must be held illegal.

The second US standard for the assistance of allegedly anticompetitive practices is the *per se* approach, where judges and authorities can avoid these various steps and decide, on face value, whether a practice is illegal. That standard is applied to a limited set of practices adopted in certain circumstances, which are identified restrictively in the jurisprudence. In substance, it is applicable in situations where there is a very high probability that anticompetitive effects exist.

In this paper, we will only use European terminology and make the choice not to refer to US terms, although these terms are certainly interesting in their own right and appropriate to deal with issues in US law. The reason

for this decision is that, in my experience, rules never come alone. They are developed in connection and conjunction with other norms in a specific legal order, where they serve certain functions depending on the type of role which is allocated to them in that global context. Extracting a rule from its legal order, without fully analysing its function and relative position, carries with it the risk of misinterpreting its role—and importing it in another order where it has connection with no notion, norm, or principle.⁴⁴

IX. Object based?

In referring to these various terms and types of approach during the case at hand, Intel argued that the European approach is object-based. The firm contended that the determination that an abuse had been committed was based on the content of practices (provision of rebates and payments)—that is, on the object of behaviour it had adopted.

For the firm, that approach is too ‘formalistic’ and should be replaced by an attitude where antitrust authorities consider the effects produced by a practice before deciding that it should be prohibited. According to Intel, it is ultimately irrelevant that a given firm has granted financial advantages to certain clients on specific markets. What matters is whether, on the whole, society has benefited from these actions. In the case at issue, it was argued, the advantages granted by Intel to its clients had made it possible to concentrate demand on one firm on the market for x86 CPUs. Economies of scale had been achieved. They were shared with clients. More revenues were acquired. They were invested in research and development—thus, in innovation.

In the European legal order, that sort of allegation made by the dominant firm must be divided in two parts. In one part, there is the submission that practices should be assessed on the basis of their effects rather than their object. The second part relates to efficiency claims—which, in the context of Article 102 TFEU, are treated as a defence, and must thus be considered in a second step, after the practice has been deemed *prima facie* illegal.⁴⁵

43 Definitions on these terms can be found in all major textbooks—eg Richard Wish and David Bailey, *Competition Law* (7th edn, OUP, Oxford, 2012) pp. 115 seq and 192 seq. or Alison Jones and Brenda Sufrin, *EU Competition Law* (5th edn, OUP, Oxford 2014) pp. 382 seq. For an excellent analysis of these notions in the context of Article 101 TFEU, Joanna Goyder, ‘Cet *Obscur Objet*: Object Restrictions in Vertical Agreements’ (2011) 2:4 *Journal of European Competition Law and Practice* 327–39.

44 This does not detract from the importance of comparative studies, but such studies cannot be limited to one rule or set of rules. The comparison must be from system to system, and seek to understand how solutions derive from principles serving as fundamentals to the legal order.

45 Efficiency defenses under Article 102 TFEU are not part of this paper, and will not be considered here. On the topic, see Robert Donoghue and Jose Padilla, Oxford, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013); Ekaterin Rousseva, ‘Reflections on the Relevance of Efficiency Defenses in Modern EU Antitrust Law’ in College of Europe (ed.), *Ten Years of Effects Based Approach in EU Competition Law*, conference organized by the College of Europe, 2011, available at https://www.coleurope.eu/content/gclcd/documents/7th_conference/8.%20E.%20Rousseva%20-%20Reflections%20on%20the%20relevance%20of%20efficiency%20defences%20in%20modern%20EU%20antitrust%20law.pdf.

As regards the first part, the statement that the Decision was adopted without references to effects does not entirely correspond with what can be observed in the Ruling. The three types of practices are considered abusive by the GC in the light of their capacity to produce anticompetitive 'effects'. The reference to effects appears central to the GC's approach. In the Ruling, there is not a single paragraph that contains a definition of abusive practices but does not contain multiple references to the capacity of such practices to produce anticompetitive effects.

Thus, the effect of exclusivity-based rebates is to compel clients not to deal with competitors; to impede competitors from dealing with clients; and to prevent clients from choosing the products or services best corresponding to their needs.

The effect of fidelity-enhancing measures is the same, even if the idea of exclusivity is not mentioned there explicitly. As a result of the pressure placed on them, clients are deprived from their freedom to choose. The consequence is that competitors do not have access to clients—or, at least, that their access is made more complicated.

Therefore, anticompetitive effects were clearly produced by the practices adopted by Intel—and the existence of these effects makes it difficult to consider, as the majority of commentators do, that the approach used by the case law is not, strictly speaking, effect-based.

What is correct, however, is that the case law does not require the Commission to produce evidence, substantiated by specific quantitative tools, establishing that certain effects were indeed produced.

In view of this, the question raised in the discussions around the case law can be formulated as follows: is it necessary, or even useful, to require competition authorities⁴⁶ to provide significant evidence using specific quantitative tools in situations where it appears from the record that a company:

- is placed in a business environment where the principle is to grow at the expense of competitors,
- in that environment, has acquired the capacity to weaken and eliminate those competitors,
- in that position, has adopted a practice which had, as its objective, to hurt them,

- has actually implemented that practice – thereby effectively producing the effect it was intending to produce (depriving customers of their freedom to choose, making the access of competitors more difficult)?

X. Chicago inspiration

In demanding that this evidence be produced by the Commission, Intel proposes to transform the European procedure on Article 102 TFEU into a new regime where no action would be taken against dominant firms without a comparative, comprehensive examination of pro and anticompetitive effects carried out by public authorities (or plaintiffs, if the case is brought by private enforcers).

That demand reflects economic arguments developed in the USA under the inspiration of the so-called Chicago School of Economics.⁴⁷ The name refers to a series of scholars and personalities originally based in Chicago who undertook to analyse policy issues with the assistance of economic tools in order to influence politics in their country. Their purpose was to articulate, in mathematically structured arguments, a mantra shared by part of the population and expressed at the highest political level by Ronald Reagan, then President of the USA.

These arguments were founded on the premise that, as a matter of principle, markets achieve better results if they are left unhindered and that as a result public interventions in the economy should be limited, if not abolished.

A first idea in the implementation of this ideology was that priority should be given, as much as possible, to private businesses. This was expressed through the principle of 'market failure', which suggests the limitation of public interventions to situations where markets do not produce satisfactory results by themselves.

That idea inspired the liberalisation process that took place in the USA in the course of last century—a process that would later extend to Europe.⁴⁸ In that process, competition was introduced on markets which for a variety of reasons had been reserved by the authorities to specified actors for decades. These markets mainly involved the use of heavy infrastructure such as telecom-

46 Or private plaintiffs in the case of private enforcement.

47 For overall views, see Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP, Oxford 2008). The book contains many contributions analysing the influence of that school on the evolution that has taken place in the interpretation given to various types of antitrust rules in the USA. See also Ross Emmett Ross (ed), *The Elgar Companion to the Chicago School of Economics* (Edward Elgar, Cheltenham UK 2010), and Herbert Hovenkamp, 'Antitrust Policy after Chicago' [1985] 84:2 Michigan Law Review 213–84. Among the books that have exercised a major influence, see also Robert Bork, *The Antitrust Paradox* (2nd edn, Free Press, New York

1993). Richard Posner, *Economic Analysis of Law* (8th edn Wolters Kluwer, New York 2008).

48 Thus, the Court of justice has taken up a central role in the liberalization process. It has acted as its driving force by declaring that all actors carrying out economic activities are bound by the rules of competition. The consequence was that the public bodies operating infrastructure qualified as dominant firms, and access-sharing obligations could be imposed on them. The Court of Justice has also played a leading role by confirming the power of the Commission to adopt liberalisation directives where the Member States have questioned that power.

munications networks or the energy distribution grid. The process was carried out by both regulatory agencies and by the judiciary (which sometimes acted on its own initiative).

In the general field of antitrust, the idea of ‘market failure’ translated into the organisation of enforcement around the notion of market power (including dominance). Before this period, there was a readiness on the part of antitrust authorities to consider as *prima facie* anti-competitive some practices irrespective of the power of the firms concerned. For instance, exclusive distribution agreements would be considered, in Europe, *prima facie* unacceptable because they would contain restrictions on competition even if the firms concluding that sort of agreement had very small market shares.

With the assistance of the market failure principle, authorities came to accept that such practices do not affect the functioning of markets as long as the firms adopting them do not have market power. In the absence of market power, customers are free to shift to alternative suppliers—and that possibility places a pressure on all market participants to constantly improve their performance and innovation capacity.

XI. The European context

The demand now made by Intel in the case examined here relates to a second principle developed within the Chicago School. After proposing that interventions should be limited to situations where markets fail, the scholars attached to that school submitted that, even in case of market failure, there is no guarantee that public authorities will do better than markets. In fact, the presumption should rather be that they would do worse (‘government failure’). This takes us back to the program driving the research carried out by members of the Chicago School, which was to liberate markets from interferences by public bodies.

In the USA, some people propose to suppress all administrations, including the Federal Reserve. Markets, they believe, will be all the better without any hindrances from the Government. In the more technical field of

antitrust, the critique has taken a less hardline and more practical allure arguing that even in situations involving very significant market power, interventions by authorities should be conditional upon the production of the type of evidence mentioned above.

If it was adopted, that proposal would radically alter the position of each actor in litigation, to the advantage of the dominant firm. Judges, authorities, and private plaintiffs would have to present a considerable body of evidence using specific and complex quantitative tools. The dominant firm, as far as it is concerned, would bear the somewhat lighter burden of criticizing the evidence, ie to find (with the assistance of the best consultants) errors or ambiguities in the demonstrations provided by the accusing parties—far from an impossible task given the complexity of the economic assessments involved.

As appears from case law, such a proposal seems difficult to reconcile with a task considered by the European courts as being essential in the light of the TFEU Treaty. That task, as it appears in the jurisprudence, is to preserve the ‘structure of competition’. As often stated in the case law, in order to enforce the TFEU, action must be taken not only in situations where harm is directly caused to consumers, but also in circumstances where the harm is only indirect - that is, where consumers may lose out as a result of damages caused to the competitive environment or the competitive process.⁴⁹

According to case law, the preservation of that environment and process entails that consumers cannot be deprived of opportunities to make choices on markets where the degree of competition is already weakened as a result of dominance.⁵⁰ In the Decision, the Commission had made it clear that the fundamental mechanism behind competition—and, as a result, behind what we consider as the structure making it possible to obtain the best possible products and services—lies in the ability of each economic actor to choose, as freely as possible, what it considers suits its needs.⁵¹

In the European context, another element to be considered is that Article 102 TFEU cannot be interpreted without reference to the institutional organization under which the provision is to be enforced. In that

49 Ruling, para 105: ‘Article [102 TFEU] is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure’.

50 On choice in competition law, see Paul Nihoul, ‘Freedom of Choice – The Emergence of a Powerful Principle in European Competition Law’ 2012 *Concurrences* 55–70—also available on SSRN. For a similar perspective in the US, see Neil Averitt and Robert Lande, ‘Using the “Consumer Choice” Approach to Antitrust Law’ (2007) *Antitrust Law Journal* 175–264 and, with a different perspective, Joshua Wright and Douglas Ginsburg, ‘The Goals of Antitrust: Welfare Trumps Choice’ (2013) *Fordham Law Review* 2405 seq.

51 The importance of this principle was made very explicit in the examination of the reasons why the third practice adopted by Intel was to be prohibited. As a reminder, that third practice consisted of payments made to OEMs to cancel, delay, or restrict the sale of products made with AMD chips. In the Decision, the Commission states that as they have been put in practice by the dominant firm, these measures have caused the limitation of choice opportunities. As a result of these measures, customers have been deprived of choice opportunities that they would have otherwise had. That this limitation imposed on customers was an effect could not be denied. See decision, para 1641 seq. and Ruling, para 202.

regard, it should not be forgotten that the application of competition rules has been decentralized. European competition law can, and must, be applied by competition authorities in all Member States. Could these authorities be requested to master complex quantitative tools?

Article 102 TFEU can be invoked before national judges because the provision has direct effect. That special feature creates a situation where private plaintiffs can sue dominant firms before national judges in all European countries, a power which has recently been reinforced by the resolution of the European institutions to increase the pace of private enforcement.

Could these judges be requested to apply a standard involving complex quantitative assessments? The European situation is very different, in that regard, from that encountered in the United States, where the federal anti-trust legislation is enforced by federal courts. In that country, the number of jurisdictions where enforcement takes place in that capacity is relatively limited—and the judges involved can be educated, probably, to a certain extent, to use complex reasoning involving heaving mathematical demonstrations.

XII. Conclusion

In the Ruling, the GC confirms that advantages provided by dominant firms are illegal when they have the capacity to restrict competition. A practice intended to restrict competition will produce that effect when used by a firm which has the capacity to restrict competition. There is no necessity to demonstrate, with the assistance of specific quantitative tools, that precise, negative effects have been produced on competition.

Does this imply that the case law is rejecting an approach where the existence of effects would be central in the determination whether a practice can or should be prohibited? Drawing that conclusion would simply deny the peculiarity of the European case law, which indeed places effect-based consideration at the heart of its approach. Under case law, practices are only deemed abusive under Article 102 TFEU where they are adopted by a company that is placed in a business environment where the principle is to grow at the expense of competi-

tors, has acquired in that environment the capacity to weaken and eliminate those competitors, adopts in that position a practice which has as its objective to hurt the latter and actually implements that practice—thereby effectively producing the effect it is intending to produce.

The debate, thus, is not whether effects should be central in the determination of whether practices are illegal, but on whether the existence of such effects should be established through specific economic models by competition authorities or private plaintiffs before starting actions against dominant firms. On this point, the Ruling confirms the approach earlier announced by the Court of justice that it is not ready to alter its case law but would like to confirm it, on the contrary, by considering that consumers cannot be deprived of choice opportunities and that the structure of competition must not be further weakened on markets where it is already damaged as a result of the existence of a dominant position.

Given that position, what will the Guidance Paper become? Officially, that Paper was adopted to provide criteria for the selection of priority cases by the Commission. If the scope of the document was really the one declared, its existence does not need to be affected by the Ruling. Under case law, the Commission has a significant margin of discretion to decide how to use enforcement resources.

But one should not be naïve. A realistic interpretation would be to consider that, through the Guidance paper, the Commission was willing to bring European competition policy closer to economic theories currently dominating the debates in the USA. Intel was probably a test case for that strategy. If the new propositions were accepted, the Commission could start engineering a ‘modernisation’ of European competition law. If they were rejected by the European courts, the Commission would suffer no set back as it was still applying, in parallel, the ‘settled case law’.

With the Ruling, the second option is materializing - and the following question deserves as a result to be raised: would there be any need to maintain the Guidance paper in existence if the Ruling was to be confirmed by the Court of justice?

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