

Editorial

Intel v Commission: Keep Calm and Carry on!

Richard Whish*

Few competition law cases have excited as much attention as the General Court's *Intel* judgment of 12 June 2014, in which it upheld the Commission's finding that Intel had infringed Article 102 and the fine of €1.06 billion that it had imposed on it. The judgment has been greeted with huge hostility. At a recent conference I heard a senior economist refer to it as a 'return to the Dark Ages'; a session at the GCR conference in Brussels in November will include a session on 'sifting the wreckage of the Intel General Court judgment'; Jim Venit's commentary on the judgment is entitled 'All Steps Backward and No Steps Forward'. One law firm's briefing declares that the judgment 'bans' rebate schemes that may be beneficial to consumers and may chill legitimate business behaviour; another says that the judgment creates more legal uncertainty, which is not easy to reconcile with the common criticism that it reverts to a form-based system that automatically prohibits exclusivity rebates: if that is the case, it makes the law more certain, not less. The judgment is also said to widen the gap between what the Commission intended to achieve by its *Guidance on Article 102 Enforcement Priorities* and the jurisprudence of the Courts in Luxembourg.

Of course there have also been more measured commentaries on *Intel*, not least by Paul Nihoul in this journal who helpfully examines why the EU courts do not adopt the same line as the Federal Courts in the US in their application of section 2 of the Sherman Act. Wouter Wils has argued powerfully that Intel is both legally and economically sound, and that the so-called 'more economic approach' to the enforcement of Article 102 is unsound.

The debate now moves to the Court of Justice. Intel's grounds of appeal have recently been published in the Official Journal: it argues that the General Court erred in law by concluding that the rebates in question were inherently capable of restricting competition; it was wrong to proceed on the basis of 'abstract considerations rather than likely or actual effects'; and it should have taken into account a number of factors such as the market coverage of the practices, their duration, falling prices

and a lack of foreclosure, as well as the conclusions that should properly have been drawn from the Commission's analysis of the 'as-efficient competitor' test in its decision. Other grounds of appeal address, among other issues, extraterritorial jurisdiction and the level of the fine.

It can hardly be an exaggeration to suggest that the Court of Justice's judgment in *Intel* will be one of the most important on competition law for many years, and it will certainly be eagerly anticipated. My expectation is that the Court of Justice will uphold the judgment of the General Court, not because it believes in the Dark Ages and enjoys wreckage, but because the judgment is perfectly sensible, except for paragraph 116 on the issue of appreciable effect: I will address this point at the end of this note.

The General Court identified three categories of rebate: quantity rebates, exclusivity rebates (traditionally called loyalty rebates, but now renamed) and a third category of 'other' rebates. Quantity rebates are presumptively lawful; exclusivity rebates presumptively unlawful in the absence of an objective justification; and the 'third category' rebates require detailed analysis to test their compatibility with Article 102. The judgment is predominantly concerned with exclusivity rebates, and it is this part that has caused so much controversy, in particular because it is 'form-based' and is said, by some commentators, to make them 'per se' illegal.

I find both criticisms unconvincing. The expression 'form-based' is always used pejoratively, but laws by their very nature have 'form'. It is as a result of the form-based nature of Article 102 that only dominant firms can be found guilty of abuse: it is not abusive to attempt to become dominant (whereas section 2 of the Sherman Act applies both to 'every person who shall monopolize or attempt to monopolize' trade or commerce). In some circumstances it is unlawful under Article 102 not to grant access to an input that cannot be duplicated, but competition law does not impose the same duty in relation to something that can be duplicated: a 'formal' rule. Plenty of other perfectly sensible rules of this kind could be listed. Such rules exist in order to render Article 102 administrable: lawyers, economists, officials, and

* Emeritus Professor of Law, King's College London; QC (Hon) – Law, Strand London W1T6DP, United Kingdom.

judges—and above all businesses—have to be able to predict with reasonable certainty what is lawful and what is not. The General Court's concern is that exclusivity—and its analogue, exclusivity rebates—when practiced by a dominant firm is, by its very nature, capable of restricting competition (see for example paragraph 85 of the judgment). This rule has 'form', but it is not determinative, because the dominant firm has the right to argue that there is a justification for the exclusivity (or the exclusivity rebate) (see paragraph 81). It is therefore simply wrong to argue that *Intel* introduces (or perpetuates) a 'per se' rule: what *Intel* does is to reverse the evidential burden of proof where exclusivity is practiced by a dominant firm, in that it is for the latter to adduce evidence of the objective justification. The Commission must then either accept the evidence, or show why it is not convincing. This is precisely what happens under Article 101 where, for example, if an agreement is found to violate Article 101(1), the evidential burden of proof reverses to the parties to the agreement to demonstrate that the agreement produces economic efficiencies of the type countenanced by Article 101(3). It is then for the Commission to prove that this is not the case.

Delimitis v Henninger Bräu has taught us that exclusivity agreements do not have as their 'object' the restriction of competition for the purposes of Article 101: but is a formal rule that reverses the evidential burden of proof in a case where a firm dominates a market perverse? If one firm has the ability to act 'independently of its competitors, customers and ultimately of its consumers' (*United Brands*) the state of competition in that market can hardly be healthy, to say the least. It is not clear why it should be regarded as wrong in principle—or divorced from economics—to apply a stricter standard to exclusivity where a firm is dominant or, as I would prefer to say, has substantial market power. A notable feature of the *Intel* case is that, in its appeal to the General Court, Intel did not put forward any evidence of an objective justification for its exclusivity rebates (paragraphs 94 and 173 of the judgment). I do not know why this was the case. It can hardly be because it was unclear in law that objective justification could be run as a defence: this has been the law at least since *Télémarketing* (1985).

Critics of the judgment lament the General Court's rejection of the 'as-efficient competitor test' and the argument that, to be abusive, the rebated prices should be below some measure of cost (see in particular paragraphs 140 to 166). This is taken to be a rejection of an effects-based, or a 'more economic', approach to the enforcement of Article 102, and an implied rejection of the Commission's *Guidance*. Again I find these two criticisms unconvincing. The Court of Justice has clearly

committed itself to both an effects-based approach to Article 102, and to the as-efficient competitor test, in judgments such as *TeliaSonera* and *Post Denmark*. What distinguishes *Intel* (and *Tomra*) from those cases is simply that rebates are not a price-based abuse: the essence of the problem is the exclusivity, not the price: the dominant firm must therefore produce evidence to justify it. As for the *Guidance*, it is what it says it is: guidance on the cases that the Commission is likely in future to select for enforcement action. I am not aware of any rebate cases currently being investigated by the Commission: perhaps because the Commission is doing precisely what it said it would do in its *Guidance*! Both *Tomra* and *Intel* were initiated before the adoption of the *Guidance*, and so it is irrelevant to the selection of those cases for investigation.

One feature of the *Intel* judgment disturbs me: paragraph 116 says that in an Article 102 case there is no room for the application of a *de minimis* threshold: it is not necessary to show an *appreciable* effect. This finding is based on paragraph 123 of the *Hoffmann-la Roche* judgment of 1979 and a sentence in the Advocate General's Opinion in *Tomra*, which does nothing more than cite *Roche*. In fact the Court in *Roche* simply said that, where a firm is dominant on a market, 'any further weakening of the structure of competition **may** constitute an abuse of a dominant position' (emphasis added). I hope that the Court of Justice will consider whether that one sentence, written 35 years ago, is sufficient to support the proposition that an 'abuse of minor importance' (to borrow words from the Commission's *de minimis* Notice under Article 101) can violate Article 102. In *Continental Can*, 6 years before *Roche*, the Court of Justice held that the merger would be abusive if *substantially* fetters competition; the EU Merger Regulation requires action on the Commission's part where a merger will *significantly* impede effective competition; Article 101 applies to *appreciable* effects on competition; and *de minimis* state aid is not caught by Article 107. To require the Commission to show an *appreciable* effect on the market would not be to undermine the rule that exclusivity is presumed to be abusive unless objectively justified; and it would add force to the argument that conduct cannot *per se* be found to violate Article 102.

Intel raises many other issues: but on the basic issue of exclusivity rebates it applies well-established law that is sound and sensible. A careful reading of the judgment shows that much of the criticism is misplaced. Apart from the *de minimis* issue my advice to the Court of Justice is simple: keep calm and carry on!

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