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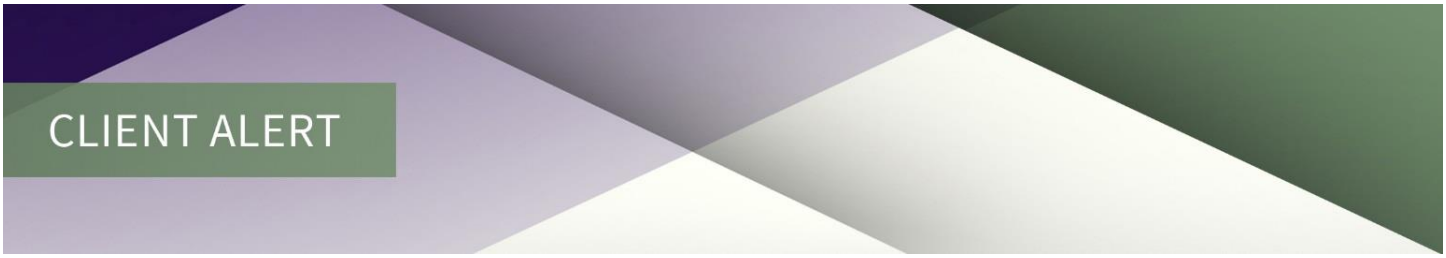

EU Competition Law and the *Intel* Case: Towards a More Effects-Based Approach of Fidelity Rebates

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On September 6, 2017, the Court of Justice of the European Union (CJEU) handed down its much-awaited *Intel* ruling.

In 2009, the European Commission (EC) imposed a – then record – €1 billion fine on Intel for having abused its dominant position on the market for x86 CPU microprocessors. The EC notably took the view that Intel had offered to several customers so-called fidelity rebates, that is to say discounts conditional on the customers obtaining all or most of their requirements from Intel. The 1979 *Hoffmann-La Roche* ruling of the CJEU introduced a *per se* approach by which such rebates, when proposed by a dominant undertaking, amount to an abuse of dominance within the meaning of article 102 of the Treaty on the Functioning of the European Union, irrespective of whether anticompetitive effects actually occurred. The EC nevertheless opted to demonstrate in its 2009 decision that Intel's rebate policy actually had generated such anticompetitive effects, notably by performing a so-called "as efficient competitor test" (AECT).

Faced with Intel's challenge, the General Court of the European Union (GCEU) sided with the EC and upheld its 2009 decision in a ruling issued in 2014. The GCEU in particular confirmed the EC was correct in using *Hoffmann-La Roche*'s *per se* approach to fidelity rebates. As a consequence, the GCEU refused to rule on Intel's arguments against the AECT.

Upon Intel's appeal, the CJEU set aside the GCEU's judgment. The CJEU reaffirmed *Hoffmann-La Roche*'s *per se* approach but added that its "*case law [had to be] clarified in the case where the undertaking concerned submits, […] on the basis of supporting evidence, that its conduct was not capable of restricting competition*;" in such a case, "*the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market*

and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and 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 from the market."

In other words, *Hoffmann-La Roche*'s *per se* approach meant that fidelity rebates, once qualified, could only be justified by evidencing efficiencies; the *Intel* judgment introduces a shift in the burden of proof by allowing the defendant to show that its conduct was not capable of restricting competition.

In the case at hand, since the GCEU refused to rule upon Intel's arguments against the Commission's AECT, its judgment was set aside and the case was referred to it for review of those arguments.

The *Intel* judgment's direct consequence is to alleviate the consequences of *Hoffmann-La Roche*'s *per se* approach and force the EC to review effects-based evidence brought forward by the defendant. The required analysis is, however, still different from a classic effects-based method for at least two reasons. First, because it is the defendant, not the EC, that must bring forward the effects-based evidence. Second, because the standard of proof is high: the defendant must show that its conduct was "not capable" of restricting competition; under such a test, it is unclear that showing competition was actually not restricted in the case at hand is sufficient (even on the basis of an AECT).

This judgment is nevertheless a step toward a more economic analysis of fidelity rebates and as such seems more in line with mainstream economic thinking than the *Hoffmann-La Roche* line of cases.

As a result, dominant companies may now envisage rebate policies based on customers' requirements, provided that a robust, contemporaneous, legal and economic analysis demonstrates that such policies are not capable of restricting competition.

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