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European Court of Justice upholds annulment of Intel decision

On 24 October 2024, the European Court of Justice (CJ) upheld the European General Court's (GC) annulment of a 2009 European Commission decision, in which the Commission found that Intel had abused its dominant position by implementing a strategy intended to exclude its competitors from the market for x86 central processing units. The ruling is the latest in this long-running saga, and clarifies the scope of review required of the GC, as well as the implementation of the "as-efficient competitor" (AEC) test.

Background

In 2009, the Commission fined Intel a then-record €1.06 billion for implementing exclusivity rebates and other "*naked restrictions*" in arrangements with five original equipment manufacturers (OEMs) and one retailer. The Commission took the view that the arrangements were *per se* infringements of Article 102 TFEU, such that it did not need to prove any anticompetitive effects (although it did still conduct an effects analysis in the form of an AEC test).

The GC upheld the Commission's findings in 2014, agreeing with the Commission that exclusivity rebates were a *per se* abuse of dominance and that the Commission did not need to consider whether they had anti-competitive effects.

Intel appealed and in a much-anticipated judgment in 2017 the CJ struck down the decision and remitted the case to the GC for reconsideration. In doing so, the CJ rejected the approach of the Commission and the GC, and ruled that where a dominant firm submits evidence that its conduct was not capable of excluding competitors, the Commission *must* analyse the effects of the conduct, in particular applying the following criteria: 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, their duration and amount, as well as the possible existence of a strategy to exclude competitors that are at least as efficient as the dominant undertaking (in other words, as-efficient competitors or AECs) (see our previous briefing for more detail).

In its second ruling, in January 2022, the GC found that the part of the Commission's decision relating to exclusivity rebates was "*vitiated by errors*" and annulled the fine in full (see our previous briefing for further detail).[1] In particular, the GC found that the Commission had been wrong to treat Intel's exclusivity rebates as automatically anticompetitive. The GC conducted a detailed examination of the Commission's AEC analysis and found it was vitiated by numerous errors. It also found that the Commission had not taken into account all the relevant criteria identified by the CJ in its earlier

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[1] Although the Commission's findings were only annulled insofar as they related to the exclusivity rebates at issue (the Commission's findings regarding the naked restrictions were upheld by the GC), the GC considered that it was not in a position to identify the amount of the fine relating solely to the naked restrictions, so annulled the fine in full. The Commission, therefore, adopted a new decision on 22 September 2023 focusing on naked restrictions, which is currently being challenged by Intel in a parallel set of proceedings.

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judgment as required for an effects analysis - specifically, the Commission had not considered properly the share of the market covered by the rebates, nor analysed their duration correctly. The Commission appealed the judgment to the CJ.

The CJ's judgment

The latest ruling from the CJ upholds the GC's annulment of the fine, rejecting all grounds of appeal raised by the Commission.

Scope of judicial review

The Commission's first of the two grounds of review related to the scope of the judicial review required of the GC in analysing the capacity of the rebates to restrict competition. The Commission had argued that the GC had wrongly limited its examination of the criteria required for an effects analysis (set out above) to the adequacy of the Commission's analysis of the share of the market covered by the rebates and their duration, without taking into account any of the other criteria for assessing the capability of the rebates to foreclose competition - in its view, the GC should have examined whether, despite the shortcomings identified by the GC in respect of the Commission's examination of those two criteria, the Commission's decision contained analysis with regard to the other criteria justifying the finding that the contested rebates were capable of foreclosing competition.

The CJ rejected this argument, holding that the GC could not be criticised for failing to consider whether other parts of the Commission's decision contained material that made it "*possible to construct a line of reasoning that demonstrates the capability of the contested rebates to have an anticompetitive foreclosure effect*", since to do so would require it to "*substitut[e] its own reasoning*" for that of the Commission.

"As-efficient competitor" test

At the heart of the case is the application of the AEC test, with the CJ called upon by the Commission to review the GC's examination of the Commission's AEC test.

In its judgment the CJ recalls the well-established line of case law that it is not the purpose of Article 102 TFEU to protect competitors which are less efficient than the dominant undertaking - nevertheless, Article 102 TFEU does prohibit dominant companies engaging in practices which have an exclusionary effect on competitors who are as efficient as them, thereby strengthening their dominant position through methods not falling within the scope of competition on the merits.

While such practices may include loyalty rebates such as those at issue in the case, the CJ recalls the principle established by the court in *Intel* in 2017 that where a dominant undertaking submits evidence that its conduct was not capable of producing the alleged foreclosure effects, the Commission must analyse the effects of the conduct, including analysing certain specific criteria (namely, those set out above). The CJ also notes that whether such rebates are capable of foreclosing an AEC should *"as a general rule"* be assessed using the AEC test - though it also notes that this test is "*merely one of the ways*" of assessing whether a dominant undertaking has "*used means other than those that come within the scope of 'normal' competition*", or "*competition on the merits*".

Against this background, the CJ conducted a detailed analysis of the Commission's AEC test and of the GC's assessment of that test, and upheld the GC's findings that the Commission's analysis was vitiated by errors.

The CJ also dismissed the Commission's argument that the GC had failed to take into account the fact that AMD was itself an AEC (which had been foreclosed) due to its products being high-performance, innovative and attractive. The CJ held that this was irrelevant - the AEC test is a "*hypothetical exercise*" making it possible to determine whether a competitor as efficient as Intel would be foreclosed from the market as a result of the rebates - such analysis, the CJ held, is independent of AMD's actual ability to remain on the market. The CJ noted that such analysis may therefore "*demonstrate that the contested rebates were […] capable of foreclosing a[n AEC], even if AMD had not itself been foreclosed, just as it may reveal the lack of such capability, despite the fact that one or other of the dominant undertaking's competitors left the market or was marginalised*".

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Implications

Just over 24 years after AMD lodged its original complaint with the Commission, the CJ ruling definitively settles the long-running dispute between Intel and the Commission – at least on the subject of Intel's exclusivity rebates. The battle over the naked restrictions continues, with Intel having appealed the Commission's September 2023 decision on these to the GC last December.

The judgment marks another high-profile defeat for the Commission when defending its Article 102 decisions, following the GC's annulment of the Commission's decision in Google AdSense in September. It also brings into (even greater) question the Commission's draft guidelines on exclusionary abuses of dominance under Article 102 (which are discussed in detail in our briefing). If the extensive criticism the draft guidelines have received has not already prompted the Commission to give them a serious rethink, perhaps this latest development – in what can only be considered as one of the most seminal Article 102 cases of all time - will spur it to do so.

OTHER DEVELOPMENTS

ANTITRUST

South Korea invites public feedback on revised enforcement guidelines on unfair trade practices

The Korea Fair Trade Commission (KFTC) has published an administrative notice containing its proposed revisions to the "Unfair Trade Practice Enforcement Guidelines". The revised guidelines are open for public consultation until 13 November 2024.

The guidelines (which were first published on 1 January 2005 and last revised on 30 December 2021) set out the key principles and factors the KFTC will consider and apply when examining potential unfair trade practices under Article 45(1) of the Monopoly Regulation and Fair Trade Act (FTA). The revisions have been made to reflect recent trials and court rulings, and recommendations from the business community. Key revisions include:

- New illustrative examples have been included on what constitutes "*unfair enticement of a competitor's customers*". In particular, following recent cases such as the KFTC's enforcement against GSK, the KFTC noted that the filing of a patent infringement lawsuit for the purpose of preventing a competitor's entry into the relevant market may violate the FTA;
- The KFTC has clarified that activities undertaken for the purpose of complying with domestic and/or international ESG regulations are unlikely to constitute an "*abuse of superior bargaining position*" and thus unlikely to violate the FTA;
- The guidelines recognise that start-ups often find it difficult to show a significant decline in sales or business activities for the purpose of showing harm caused by a larger business's misappropriation of technology. To address this, the revised guidelines clarify that the KFTC may disregard the impact the conduct has on sales if the affected businesses either has no sales (due to the early stage of the business) or has unstable sales or revenue due to the inherent nature of the business.

Based on the KFTC's annual reports, more than 20% of total FTA enforcement cases concern unfair trade practices. The proposed revisions serve as a useful guide to reflect the KFTC's most up-to-date approach to enforcement.

GENERAL COMPETITION

UK Government and EU reach Competition Cooperation Agreement

On 29 October 2024, the European Commission and the UK Government announced that they have successfully finalised the technical discussions on a new competition cooperation agreement.

This agreement will supplement the existing EU-UK Trade and Cooperation Agreement and, if ratified, will allow the UK Competition and Markets Authority (CMA) to coordinate directly with the Commission and EU national

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competition authorities (NCAs) in competition investigations. As a key step in promoting cooperation in competition enforcement after Brexit, this is the first EU competition cooperation agreement with a third country to establish such direct links.

This agreement was long-awaited following the UK's exit, due to Brexit, from the European Competition Network (which ensures seamless cooperation in enforcing EU antitrust laws). Although the exact details of the cooperation agreement are yet to be seen, it seeks to reestablish a similar framework. However, there will be certain restrictions on information exchange that do not exist between pre-existing members of the European Competition Network – in particular, while the agreement will enable the CMA, the Commission and NCAs to bring investigations to each other's attention and to coordinate antitrust and merger investigations, the sharing of confidential information between the CMA and the Commission / NCAs will require explicit consent from businesses.

The agreement was commended by Margrethe Vestager, the outgoing EU Competition Commissioner, who noted its potential to create a "*predictable and transparent framework*". Referring to the increasingly global nature of business operations, CMA head Sarah Cardell also welcomed the agreement, emphasising that it will allow the CMA to work "*even more closely*" together with the EU competition authorities "*without unnecessary barriers*".

The agreement will require approval from both the European Parliament and the EU Council as well as the UK Parliament and is expected to be signed in 2025.

CMA publishes State of UK Competition Report 2024

On 24 October 2024, the CMA published its report on the state of competition in the UK. It is the third report of its kind to be published on the state of competition across the UK economy, analysing trends in key cross-economy indicators of competition, the drivers of changes and the implications for policy.

The report noted a slight decrease in competition over the last 25 years, albeit at a slower rate than some other advanced economies, such as the US. It highlighted that mark-ups (i.e. the difference between the selling price of a good or service and the amount it costs to make) have on average risen by 10% over the past 25 years - the increase being more significant in the services sector compared with the manufacturing, construction, accommodation and food services sectors. Notably, the report finds that the rise in mark-ups has been driven mainly by more entrenched and larger firms with higher pre-existing mark-ups. Interestingly, this corresponds with the CMA's findings of a reduction in business dynamism (a feature already identified in its 2022 State of Competition Report), reflecting the fact that established firms are better able to sustain their position over time and that new entrants are less successful than they used to be in displacing these incumbents. Additionally, the CMA identified technological changes as playing an important role in mark-ups, because fixed cost investments relying on or otherwise making use of technology (e.g. R&D, software and branding) have become increasingly important to firms' ability to compete effectively and, consequently, firms making these investments are increasing mark-ups to cover these costs. However, since investment in technology can also create barriers to entry, it can also lead to lower levels of effective competition: the report therefore also highlights continued effective merger control and competition enforcement as key to keeping market power in check.

Building on the report's findings, the CMA's Microeconomics Unit will now launch a '*programme of work focused on growth and industrial strategy*'. According to its announcement, this will include an analysis of barriers to the spread of new technology across the economy; market power and resilience in supply chains; policy levers to support business dynamism; and the role of competition in driving and directing productive investment.

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