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ALERT MEMORANDUM

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The EU General Court's *Intel* Judgment:

Defining the Scope of Economic Analysis under Article 102 TFEU

On June 12, 2014,[1] the EU General Court (the "General Court", or the "Court") upheld in its entirety a May 2009 decision of the EU Commission imposing a record fine of €1.06 billion on Intel for abusing its dominant position in the market for x86 central processing units (CPUs).[2]

The General Court confirmed the Commission's finding that Intel had acted unlawfully by granting rebates and other payments to a number of computer manufacturers (Dell, HP, NEC, Lenovo), as well as Europe's largest electronics retailer, Media Saturn (MSH), that were conditioned on exclusivity or quasi-exclusivity.[3] The General Court's judgment is significant as it confirms that, unless they are "*objectively justified*," rebates granted by dominant undertakings that are conditioned on exclusivity will generally be considered abusive, without any evidence that they in fact produce any anti-competitive effects. This is so even if the customer does not commit to exclusivity, but only loses the rebate if it buys from others.

In the decision under appeal, the Commission had held that Intel's rebates infringed Article 102 TFEU based on the long-standing precedent set by the European Court of Justice ("ECJ") in *Hoffmann-La Roche*, under which rebates conditioned on exclusivity are generally considered abusive (save in unusual circumstances where they may be objectively justified).[4] Notwithstanding its reliance on this case law, the Commission, "*for completeness*," had also considered in some detail the actual foreclosure effects of the rebates in question, based on the so-called "*as-efficient competitor test*" set out in the Commission's 2009 Guidance Paper on enforcement

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1 Case T-286/09, *Intel v. Commission*, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=153543&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=315037. (the "Intel Judgment").

2 European Commission, COMP/37.990, Intel.

3 In addition, the Commission found that Intel infringed Article 102 TFEU through cash payments made to HP, Acer and Lenovo conditioned on those manufacturers either cancelling, postponing the launch, or restricting their distribution of PCs incorporating CPUs from Intel's only significant rival, AMD (referred to by the Commission as "*naked restrictions*").

4 Case 85/76 *Hoffmann-La Roche,* [1979] ECR 461, para 89.

priorities under Article 102 TFEU. Based on this "*effects-based*" analysis, the Commission had concluded that Intel's rebates were such that an equally efficient competitor would have been unable effectively to compete for sales that it could otherwise realistically have contested (the "*contestable*" share) because the rival would have been forced to price below cost to match Intel's discount.

This reasoning represented the first occasion on which the Commission had used an effects-based analysis for alleged exclusivity rebates under Article 102 TFEU, even though it did so only "*for completeness*." In its appeal, Intel contended that, as a matter of law, the Commission would have been required to prove actual anti-competitive effects to support any finding that exclusivity rebates were abusive. Intel further argued, as a matter of fact, that the Commission had failed to provide such proof. Many observers therefore viewed the proceeding as a test case that would determine whether the General Court would endorse an effects-based approach to exclusivity rebates under Article 102 TFEU.

The General Court confirmed, based on existing case law and, in particular, *Hoffmann-La Roche*, that an effects-based analysis is not required to establish that exclusivity rebates infringe Article 102 TFEU as such rebates, "*by their very nature*," would be capable of restricting competition. The General Court's judgment therefore essentially confirms the case law that has been in place since the 1970's.

It remains to be seen whether Intel will appeal the judgment to the ECJ, and, if so, whether the ECJ will maintain the General Court's position. In the meantime, while the judgment is clear that no effects-based economic analysis is required to establish that exclusivity rebates infringe Article 102 TFEU as a matter of substantive law, it should not have direct consequences for the Commission's enforcement policy. The Commission's stated position in this regard remains that set out in its 2009 Guidance Paper, according to which the Commission will direct its enforcement efforts to situations in which there are actual anti-competitive effects, as determined by the as-efficient competitor test. The test will therefore remain of practical importance with respect to the Commission's investigations, although it will not shield companies from private litigation or from pursuit by national authorities.

Moreover, the General Court expressly reaffirmed the ECJ's holding in *Post Danmark* that the as-efficient competitor test is central to the analysis of what it termed pure "*pricing practices*" (*i.e.*, unconditional pricing or discounting practices that are not subject to exclusivity or other conditions on the customer's purchasing behavior that are potentially exclusionary). As such, the as-efficient competitor test retains its relevance as a benchmark for Article 102 TFEU enforcement more generally, including in respect of rebate practices, provided they do not amount to exclusivity or quasi-exclusivity rebates.

I. Categorization of Rebate Schemes

To frame its legal analysis, the General Court analyzed and invoked long-standing case law to draw a "*distinction … between three categories of rebates:*"

- **Quantity rebates.** These are rebates "*linked solely to the volume of purchases,*" *i.e.*, they are granted as a customer's purchase volumes increase. The Court noted that such rebates are "*generally considered*" not to breach Article 102 TFEU on the grounds that, if "*increasing the quantity supplied results in lower costs for the supplier,"* the supplier *"is entitled to pass on that reduction to the customer in the form of a more favourable tariff*."[5] The judgment does not elaborate on this type of rebate or identify specific examples of such rebates. The Court may have had in mind uniformly applicable volume-based rebate scales (but, depending on the specifics—notably retroactivity—these rebates can also produce "fidelity-building" effects, as discussed under the third category below). At a minimum, this reasoning should apply to rebates offered in return for firm commitments to purchase certain volumes (which may reduce costs by facilitating, *e.g.*, production planning), or rebates offered on bulk orders (which might reduce delivery or logistics costs). Although the Court refers to cost savings that arise from increased quantities, it does not say that suppliers would have to prove actual savings in an individual case.

- **Exclusivity rebates.** These are rebates conditional on the customer obtaining "*all or most*" of its demand from a dominant undertaking, *i.e.* requiring exclusivity or quasi-exclusivity. As noted, the Court recalled existing case law and set out a blanket rule that, absent objective justification, such rebates are abusive because they are "*not based—save in exceptional circumstances—on an economic transaction which justifies this burden or benefit,"* but are rather *"designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market.*" These are the types of rebates the Commission found Intel to engage in, as discussed in greater detail below.

- **Other conditional, "fidelity-inducing" rebate systems.** Finally, the Court sets out a third category of rebates, where the grant of a financial incentive is "*not directly linked to a condition of exclusive or quasi-exclusive supply,*" but "*the mechanism for granting the rebate may also have a fidelity-building effect.*" Such rebates might include retroactive volume rebate systems that depend on the attainment of individual sales objectives, such as the rebates

[5] Intel Judgment, para 75.

discussed in *Tomra*.[6] Rebates falling within this category therefore have the potential to be abusive, but whether this is in fact the case depends on an assessment of the effects of the rebate in the individual case. It is thus necessary to show that the specific rebate mechanism has in fact a "fidelity-inducing" effect similar to an exclusivity discount. Once this is established, the Court (citing *Michelin I*)[7] considered that it "*is not essential*" to show that the rebate scheme in question would fail the as-efficient competitor test,[8] noting that this test *"only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult."*[9]

That said, it seems clear that, conversely, if a rebate scheme does fail the as-efficient competitor test, it would be considered abusive. In addition, it is unclear to what extent the arguments that the Court rejected in *Intel* concerning the level, duration, coverage, and potential foreclosure effects of a given rebate system (discussed below) would be accepted by the General Court for rebates of this type, although, since they bear on the "fidelity-inducing" effects, they should.

Importantly, the Court further distinguishes the three types of conditional rebates above from what it calls pure "*pricing practices.*" Intel cited *TeliaSonera*[10] and *Post Danmark*[11] in support of its arguments that the Commission should be required to apply the as-efficient competitor test to alleged exclusivity rebates. The Court rejected this argument, holding that "*the scope of that case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates.*"[12] However, in so doing, the Court expressly affirmed the continued relevance of the as-efficient competitor test to other categories of abuse. As the Court noted, the competition concerns at issue in *Intel* were "*not based on the exact amount of the rebates,*" but on the fact that the rebates were "*conditional on exclusive or quasi-exclusive supply.*" By contrast, because "*the level of a price cannot be regarded as unlawful in itself,*" the as-efficient competitor test has a key role in distinguishing legitimate and non-legitimate prices.[13] For example, the Court accepts that allegations of selective price cuts or

6 *Tomra v Commission*, Case C 549/10 P, judgment of 19 April 2012.

7 In *Michelin I*, the ECJ "*relied on the loyalty mechanism of the rebates at issue, without requiring proof, by means of a quantitative test, that competitors had been forced to sell at a loss*" (Intel Judgment, para 144).

8 Intel Judgment, para 144.

9 *Ibid.*, para 150.

10 Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527

11 Case C-209/10 *Post Danmark* [2012] ECR

12 Intel Judgment, para 99.

13 *Ibid.*

discriminatory pricing (as in *Post Danmark*) ought to be analyzed using the as-efficient competitor test, because in such cases the question is the level of the price itself as opposed to pricing that is conditioned on customers' purchasing behavior.

II. Legal Assessment of Exclusivity Rebates

In assessing the compatibility with Article 102 TFEU of Intel's rebate schemes, the General Court, as a starting point for its analysis, agreed with the Commission that Intel's rebates were indeed "*rebates falling within the second category, namely exclusivity rebates*."[14] The judgment states, in no uncertain terms, that once a rebate is characterized as such an exclusivity rebate, the existence of an abuse "*does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect*."[15] The only possible defense open to a dominant company is "*objective justification,*" although the Court gives no examples of what such an objective justification might consist of, and any such circumstance is probably going to be rare in practice (one example may be the need for a period of exclusivity to fund investment in new capacity dependent on demand from a certain customer). For all intents and purposes, therefore, the General Court thus confirmed that Article 102 TFEU generally prohibits exclusivity rebates by dominant companies*, i.e.*, without any evidence that they actually produce anticompetitive effects, unless they are objectively justified.

This approach, which distinguishes between different types of rebates, and requires an effects-based analysis for some, but not for others, resembles the distinction made between restrictions of competition by object and effect in the context of Article 101 TFEU. The Court justifies its position regarding exclusivity rebates on the basis that such rebates, when granted by a dominant company, are "*by their very nature capable of restricting competition,"* as the "*undertaking in a dominant position grants a financial advantage designed to prevent customers from obtaining their supplies form competing producers."*[16] Interestingly, the Court acknowledges that, in the Article 101 TFEU context (*i.e.*, in the absence of dominance), "*exclusivity conditions may, in principle, have beneficial effects for competition"* making it necessary "*to assess their effects on the market in their specific context.*"[17] The justification offered by the Court for this apparent inconsistency under Articles 101 and 102 TFEU is the "*special*

[14] *Ibid.*, para 79.

[15] *Ibid.*, para 80.

[16] *Ibid.*, para 85-86.

[17] *See* Case C-234/89 *Delimitis* [1991] ECR I-935

responsibility" of a dominant firm, and the necessity to protect the already weakened competition in the market concerned from "*additional interference.*"[18]

With specific regard to the *Intel* situation, the Court added that where an undertaking had a "*strong dominant position*" and was an "*unavoidable trading partner*" for a substantial part of the customers' demand, the exclusivity rebate would permit it to "*use the non-contestable share of demand of the customer as leverage to secure also the contestable share,"* as a competing offer for the contestable share would need to equalize the loss of the rebate for both the contestable and the non-contestable share.[19] In the Court's view, this reasoning is sufficient to absolve the Commission of any need to assess the existence of any (even potential) foreclosure effects of exclusivity rebates to find an abuse. Based on the Court's wording, this reasoning applies even if an assessment of the circumstances of the case would in fact reveal no foreclosure, or even potential foreclosure, of as-efficient competitors.

The consequences of having a rebate scheme classified an exclusivity rebate therefore can be harsh for dominant companies. These consequences are well illustrated by the arguments raised by Intel in its appeal, all of which the Court explicitly rejected, as a matter of principle, in cases in which rebates are given for exclusivity:

- **Lack of causality irrelevant.** Even if a dominant company can prove that customers would buy from it in the absence of the rebates, the rebate can still be abusive. As the Court puts it, there is no need to prove "*either direct damage to consumers or a causal link between such damage and the practices at issue.*"[20]

- **Level of rebates irrelevant.** The Court holds that exclusive rebates by a dominant company are abusive, even when set at very low levels, because "*it is not the level of the rebates which is at issue in the contested decision but the exclusivity for which they were given.*"[21]

- **Rivals' ability to offset rebates irrelevant.** The reasoning above applies "*irrespective"* of "*whether the competing supplier could have compensated the customer for the loss of the rebate if that customer switched supplier*."[22]

- **Motivation for rebates irrelevant.** Intel cited a number of other rationales for the rebates (which were not expressly granted for exclusivity, see below), but the

[18] Intel Judgment, para 90.

[19] *Ibid.*, paras 91-92 and 103.

[20] *Ibid.*, para 105.

[21] *Ibid.,* para 108.

[22] *Ibid.*

Court was satisfied that Intel granted the rebates at issue "*at least in part*" in consideration of exclusivity, and that therefore they were abusive.[23] As such, if the Commission finds evidence that a given rebate scheme is motivated, even in part, by a dominant firm seeking to extract exclusive purchasing from a customer, the Commission could make a finding of abuse.

- **Duration of rebate agreement irrelevant.** Some of the Intel contracts at issue were of very short duration, and terminable on 30 days' notice. The Court held that this is irrelevant, noting that "*any financial incentive to purchase exclusively constitutes interference with the structure of competition on a market*." [24]

- **Market coverage irrelevant.** Intel claimed that the rebates at issue "*concerned only a small part of the x86 CPU market, namely between 0.3% and 2% per year.*" The Court concluded that this is "*not a relevant argument,*" holding that there is no *de minimis* rule under Article 102, and that dominant companies must "*compete on the merits for the entire market and not just for a part of it*."[25]

- **Proportion of customers' demand covered irrelevant.** Some of the Intel rebates at issue only covered certain segments of its customers' demand for x86 CPUs (for example, HP's x86 CPU corporate desktop requirements amounted to only 30% of HP's total x86 CPU requirements). The Court held that this was irrelevant, holding that it is sufficient that the rebates would cover a certain "*segment*" of the market (regardless of the market definition adopted by the Commission, which encompassed all x86 CPUs).[26]

- **Customers' buyer power irrelevant.** Intel argued that its customers exercised their buyer power to extract higher levels of rebates. The court held that this was irrelevant, merely noting, in the same general terms as above, that an exclusivity requirement creates an "*additional interference*" with the "*structure of competition*" in a market "*already weakened*" by the presence of a dominant company, regardless of whether customers request the discounts themselves.[27]

Taken to its logical conclusion, the Court's judgment implies that dominant companies run the risk of infringing Article 102 TFEU, even by offering quasi-exclusivity rebates, over a mere portion of a single powerful customer's demand, at that customer's request, set at a very low rate, for a brief period of time, in circumstances where there is

23 *Ibid.*

24 *Ibid.,* para 110-113.

25 *Ibid.,* para 117.

26 *Ibid.,* para 129.

27 *Ibid.* , para 139.

no risk of foreclosing competitors, and that customer would have bought from the dominant firm anyway.

It may be that the specific facts of the case (Intel had particularly high market shares, and the rebates apparently severely affected its only significant competitor, AMD) lead the Court to make such general judicial statements rather than adopting a more nuanced approach. On the other hand, the Court's rule has the merit of clarity and simplicity.

III. Factual Assessment of Exclusivity Rebates

In these circumstances, the question of when, as a factual matter, a given rebate scheme that, as in the *Intel* case, is not expressly conditioned on exclusivity can nevertheless be deemed to be conditioned on exclusivity (or quasi-exclusivity), is of paramount importance. It goes without saying that all potentially dominant firms are well advised to review the functioning of their rebate schemes to ensure that they do not implement any rebates that could be deemed, even in part, to compensate the customer for exclusivity. Clearly, dominant companies, even if they do not expressly impose exclusive terms, ought to be particularly circumspect in how they communicate with customers in discussions surrounding rebates, lest they be characterized as "*de facto exclusive.*"

In this connection, it bears note that, aside from the legal questions discussed above, Intel also appealed the Commission's factual characterisation of its rebate schemes as "*exclusive*" or "*quasi-exclusive*" in nature. Indeed, the General Court's review of the Commission's evidentiary assessment of this question takes up the bulk of its 1,600 paragraph-long judgment. In reviewing this question, the Court applied the general standard of proof applicable to the review of antitrust cases, namely whether there is "*sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place*." [28] In reviewing the Commission's factual assessment in this regard, the Court noted that it is "*not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement,*" but that it is sufficient if the body of evidence relied on "*viewed as a whole, meets that requirement.*"[29]

As the Court notes, the rebate agreements at issue did not contain "*a formal exclusive supply obligation*,"[30] *i.e*., it was not stated in the relevant contracts that OEMs

[28] Joined Cases C-238/99 P,C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraphs 513 to 523), Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, paragraph 477.

[29] Intel Judgment, para 64

[30] *Ibid.*, para 440.

were required to source all of their x86 chipset needs from Intel or lose the benefits of the rebates (and indeed many of the OEMs expressly corroborated the lack of any such express exclusivity in their responses to the Commission's information requests). The Commission nevertheless concluded, based on a combination of evidence from OEMs' responses to Commission information requests, Intel's internal documents, and bilateral communications between Intel and its partners, that the rebates at issue were *de facto* paid in exchange for exclusivity.[31] Among other things, the Commission relied in this regard on inferences from evidence of the impressions of individuals working for Intel's trading partners as to what Intel's reaction would be if they decided to purchase from AMD to prove that Intel's rebates were conditioned on *de facto* exclusivity.

The General Court reviewed and upheld the Commission's assessment of this alleged *de facto* exclusivity. As noted above, the Court ultimately took a global view of the evidence and considered it to support the Commission's conclusion that the rebates were granted to compensate for exclusivity. The Court nevertheless carried out a lengthy and highly detailed review of many individual pieces of evidence. The Court's assessment of some of this specific evidence, and notably of contradictory evidence, is not immune from criticism, as it appears, at least in certain instances, on its face to be somewhat selective and inconsistent. For example, in certain passages, the Court seemed to second-guess statements made by OEMs in response to Commission information requests to the effect that Intel's rebates were not based on exclusivity,[32] while it relied in other contexts on such responses as dispositive evidence, in and of themselves.[33]

IV. Conclusions

Intel has yet to announce whether it will appeal the General Court's judgment to the ECJ. Other recent rulings of the ECJ (notably *Post Danmark*) have been more amenable to an effects-based analysis under Article 102 TFEU (but, as the General Court pointed out, they concerned different pricing practices). It therefore remains to be seen whether the ECJ would go so far as to overrule the General Court and set aside its own long-standing precedent on the general illegality of express or *de facto* exclusivity rebates by dominant companies.

In the meantime, and in the absence of any statement by the Commission to the contrary, the Commission's Guidance Paper remains a relevant articulation of the Commission's enforcement priorities. Although the General Court refused in *Intel* to hold that the as-efficient competitor test is a necessary legal condition for exclusivity

[31] *Ibid.*, para 444.

[32] *Ibid.*, para 469.

[33] *Ibid.,* paras 67, 692, 725.

rebates to be abusive, it did entertain in its judgment a discussion of the applicability of the Guidance Paper, but noted that the *Intel* proceeding had already been initiated before the Guidance Paper had been published.[34] This would appear to leave open the possibility in future to invoke "*legitimate expectations*" that the Commission will only pursue cases based on the as-efficient competitor test. Again, however, any such contention would not prevent civil courts or national antitrust regulators from finding exclusivity rebates to be abusive without any effects-based analysis.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition under the "Practices" section of our website at http://www.clearygottlieb.com.

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[34] *Ibid.*, para 155.

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