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THE COURT OF JUSTICE JUDGMENT ON INTEL SOME FIRST COMMENTS

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Analyzing the capacity to foreclose

- Generally (§ 138-139), when parties submit evidence that the conduct is not capable to foreclose, the Commission is required to "analyse the share of the market covered by the challenged practice as well as the conditions and arrangements for granting the rebates in questions, 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"
- The analysis of the capacity to foreclose includes an assessment of efficiency benefits (objective justifications, § 140).
- But the Commission needs first "an analysis of the intrinsic capacity of that practice to foreclose competitors which at least as efficient"
- Emphasis on the relevance of the AECT

Analysing the capacity to foreclose

- Still, if one aggregates the various element of the analysis of the relevant circumstances, it includes
- The share of the market covered
- The magnitude of the rebates (through the AECT)
- The duration (with a reference sufficiently vague that it can be understood as the duration of the contract rather than the period of time during which the rebates were granted).
- This is pretty much what AG Wahl had recommended.

The mandate of the GC

- The Commission carried out an AECT and the results played an important role in its assessment
- The GC should have examined the evidence (including the arguments of INTEL)
- But (§ 149), “The review by the GC,…, of whether the rebates at issue are capable of restricting competition involves the examination of factual and economic evidence which is for that Court to carry out”.
- And (§ 141), the GC must examine all of the applicants arguments regarding the capability to foreclose
- Hence, it is not entirely clear whether the GC should focus on the implementation of the AECT or more generally assess all the factual and economic evidence
- In any event, the GC can only consider the evidence that has been submitted in the context of its proceeding

The mandate of the GC

- Is the evidence submitted by parties, in particular by the Commission and in written pleadings, adequate ?
- This is far from clear. The GC may thus not be in position to fulfill meaningfully the mandate that it has been assigned by the ECJ.

As efficient competitor benchmark

- The ECJ emphasizes that Art 102 does not seek to ensure that competitors less efficient should remain in the market (§ 133).
- Assess the existence of a strategy aiming to exclude as efficient competitors (§ 139)
- The analysis of "intrinsic capacity to foreclose competitors which at least as efficient" (§ 141)
- This is a bit disturbing.
- The foreclosure of as efficient competitor is hardly the only meaningful benchmark to assess retroactive rebates (or rebates contingent on exclusivity)
- It is relevant when the theory of harm involves leveraging non contestable sales over a contestable segment (bundled rebates)
- Even then, it involves some type I errors (when consumers have a weak demand for the non contestable segment) and type II errors in the presence of downstream competition

As efficient competitor benchmark

- There are theories of harm for which the AECT is not meaningful.
- For instance, a theory of harm that emphasizes the ability to offer rebates when the customers face competition from downstream competitors that are not exclusive
- It may also, in some circumstances, be sensible to consider competitors that may not yet be as efficient (even if this does not make the AECT irrelevant, as argued by the GC and Post Denmark II)
- As emphasized by the guidance paper, what is required is a theory of harm and a comprehensive assessment. The exercise cannot be reduced to the implementation the AECT.
- What is an overall strategy to foreclose ? The concept is potentially circular (as explained by the AG)
- The discussion by the AG was much more sophisticated

Questions left open

- Two categories of rebates ? Rebates contingent on exclusivity and retroactive rebates (à la Tomra), versus incremental rebates. Such that there is a presumption of illegality for the former category.
- This is implicit in the judgment.
- What about the equivalence between capacity and likelihood ? And the clarification that likelihood means more than balance of probability ?
- What about the parallel with 101 and Cartes Bancaires such that the analysis of relevant circumstances is a “quick test” to confirm the presumption of illegality ?
- Which should be followed by a full fledged analysis it the quick test fails

Jurisdiction

- AG Wahl proposes a very clear discussion of the tests for jurisdiction in terms of implementation and qualified effects.
- Such that the implementation test (has the conduct put into effect in the EU) should be undertaken first.
- Lenovo involves indirect sales (laptops using Intel chips) and in the absence of a link between Intel and Lenovo, it is hard to see that the implementation test is met.
- Regarding qualified effects, the test is formulated in terms of whether the effects are substantial, immediate and foreseeable (SIF).
- The question is whether the anti-competitive effects stemming form the conduct were indeed SIF in the EEA and not whether the sale of the notebook in the EEA were significant
- Hence, is it that the conduct towards Lenovo significantly contributed to the foreclosure of AMD (which would have affect in the EEA) ?
- The ECJ does not look at the marginal effect. Merely states that by looking at individual trees, one can miss the forest

Effects and the guidance paper

- Economic analysis was put forward in the decision but as supporting rather then decisive evidence
- Expectations have built up, following the GC judgment, that it would not be taken seriously by the Court and that the guidance paper would eventually fall into oblivion (or would be withdrawn – see for instance Wills 2014).
- This judgement is an opportunity for the Commission to correct what would have been a type III error (right decision for the wrong reason).
- And it validates the hedging strategy of the Commission's decision.
- The main concern is that the GC will have to undertake a truncated analysis on the basis of limited evidence.