

Single Branding: Where do we stand after *Intel*?

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Where *Intel* (2017) moved EU antitrust law

- Efficiency
- Consumer welfare
- Effects based approach
- Harm to competition is empirical question
- Balancing of pro and anticompetitive effects
- Denial of the allegation and affirmative efficiency defense for dominant firm
- Appreciable effects
- Unifying principles under 101 and 102 TFEU

Why are we still talking about *Intel* today?

- Weak support to *Intel* framework in policy circles?
 - Effects based approach no longer an EC policy priority?
 - Competition from NCAs and national law (BdK, Facebook)
- Strategic risk?
 - Cases on appeal before GC related to investigations started before *Intel* judgment
 - *Qualcomm, Google Android, Google AdSense*
 - Perception that effects based approach raises enforcement costs, when digital markets demand agility
- Interpretive narrowing?
 - Publications from EC advocating a narrow reading of Guidance paper and *Intel*
 - Merely procedural?
 - AEC for conditional rebates, not exclusivity rebates?
- Legislative override?
 - Sector specific legislation on reversal of burden of proof in digital?

Technical issues

Substantive

- What status for AEC test?
 - Optional? But (i) legit expectations; (ii) and rights of defense
 - Hard to apply in non pricing cases and digital, but does not mean that concern for efficiency is irrelevant
- Should effects always be appreciable?
 - No because *Post Danmark II*
 - Yes in practice because if not appreciable, dominant firm will find it easy to win balancing with affirmative defense (efficiency)
 - *Post Danmark II* meant no « *denial of allegation* » on *de minimis* threshold ground by defendant

Procedural

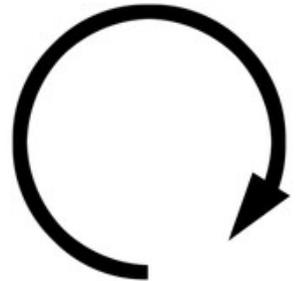
- What kind of obligation bears on agency if dominant defendant submits evidence that its conduct is not capable of restricting competition?
 - Engage adversarial discussion with defendant on its analysis, and say why not convinced before decision
 - Acknowledge defendant analysis, and say why not convinced in decision?
 - Answer in fn 26 of Guidelines on vertical restraints: “*iterative process*”?

Where do we stand on the « *more economic approach* »?

	« <i>Zeitgeist</i> »	« Legal foundations »
2015	Effects-based approach	<i>Hoffmann La Roche/United Brands</i>

Where do we stand on the « *more economic approach* »?

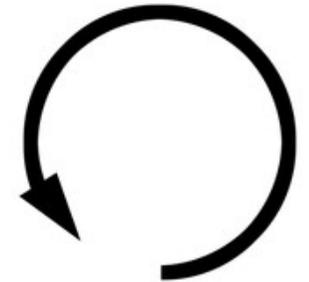
- Case-law since *Intel*
 - 102 TFEU: *MEO* (and AG Wahl Opinion)
 - 101 TFEU: AG Bobek Opinion in *Budapest Bank*



Zeitgeist?

	« <i>Zeitgeist</i> »	« Legal foundations »
2015	Effects-based approach	<i>Hoffmann La Roche/United Brands</i>
2020	EC digital agenda?	<i>Intel/Post Danmark 1/Cartes Bancaires</i>

« *Trend* » or feature?



Economic-minded case-law on exclusivity before *Intel*

Case	Date	Legal basis
<i>Post Danmark I</i>	2012	102
<i>Van den Bergh Foods</i>	2003	101 and 102
<i>BPB</i>	1993	102
<i>Delimitis</i>	1991	101
<i>LTM</i>	1966	101

Relevant materials

- Colomo, Pablo Ibáñez: The Future of Article 102 TFEU after Intel, *Journal of European Competition Law & Practice* 2018 Vol.9 nº 5 p.293-303
- Kadar, Massimiliano: Article 102 and Exclusivity Rebates in a Post-Intel World: Lessons from the Qualcomm and Google Android Cases (2019) *Journal of European Competition Law & Practice* 10(7) 439
- Petit, Nicolas: Analysis and Reflections Intel and the Rule of Reason in Abuse of Dominance Cases, *European Law Review* 2018 Vol. 43 nº 5 p.728-750
- Venit, James S.: The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?, *European Competition Journal* 2017 p.172-198