Intel Judgment

GCLC Lunchtalk series

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BRICK COURT CHAMBERS
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Agenda

- Jurisdiction
- Substance
- Procedure

Jurisdiction: Intel facts/argument

- Challenged (territorial) jurisdiction under Art. 102 in relation to Lenovo under (i) "implementation" and (ii) "qualified effects:"
  - Their manufacturing facilities were outside the EEA
  - They did not purchase CPUs in the EEA from Intel (or AMD).
  - Conduct at issue concerned sales of CPUs to customers in Asia.
  - Fact that a certain number of Lenovo computers subsequently sold in EEA irrelevant: immediate effects were in Asia

Jurisdiction: CJEU findings

- Accepts need for some limits on jurisdiction under Art.102 as a matter of public international law (¶49, 42-45)
- Approved, for first time, qualified effects test (QET) (¶45-46)
- Held QET governed Lenovo contracts:
  - Conduct must be viewed "as a whole" (¶50)
  - Probable effects = foreseeability (¶51)
  - Strategy to ensure no Lenovo notebook with AMD would end up in EEA (¶52)
  - Also "substantial" due to overall foreclosure strategy (¶55)

Jurisdiction: Points of note

- Intellectually thin (cf. US Courts on FTAIA judgments)
- Does CJEU reformulate QET at ¶49?
  - *Gencor* conditions tripartite but CJEU uses foreseeable as touchstone
- Does this matter in practice?
- Is "overall" strategy analysis specific to Intel abuse or Art. 102 (cf. CJEU in *Innolux* (Article 101))
- Response to "*immediate*" condition curious
- No quantitative analysis of "*substantial*" conditions

Substance: Intel argument

- 1 plea, 3 sub-pleas (¶108-114):
  - Exclusivity rebates not *per se* and requires "all the circumstances" analysis too, citing *Tomra* (CJEU)
  - Need to assess likelihood/capability of restriction of competition
  - GCEU analysis of "capability" insufficient:
    - Need to consider rebate coverage (14% on average v 39% in *Tomra*), duration, lack of foreclosure (AMD capacity constraints), rapid decline in prices, and AEC test (EUCFR argument) (¶115)

Substance: CJEU findings

- Reiterates that competition on the merits can (lawfully) exclude less efficient firms who have less attractive prices, quality, choice, innovation (¶134) but "special responsibility"
- Reiterates that exclusivity rebates and loyalty rebates are, or at least can be, an abuse, citing *Hoffmann La Roche* (¶137)
- BUT "*further clarified*" (!) that if defendant submits evidence to Commission of lack of foreclosure, Commission must analyse extent of dominance, coverage, rebate conditions, duration, amount, and strategy aimed at excluding as efficient competitors (¶138-139)
- Capability to foreclose also relevant to balancing under objective justification (¶140)

Substance: Points of note

- Is CJEU judgment retrograde on "loyalty" rebates (as opposed to "exclusivity"?
- Does "further clarification" effectively overrule *Hoffmann La Roche*? Object v effect dead under Art. 102?
- How does shifting burden of proof work in practice?
- Is AEC test in play only if Commission analyses it ("*in those circumstances*)"? (No ref. to *Post Danmark II*)
- How does objective justification "balancing" differ from anticompetitive foreclosure analysis?
- Judgment offers little or no guidance on materiality issues in assessment of anticompetitive foreclosure

Procedure: the eponymous Mr D1

- Commission held five-hour meeting with one of the most senior Dell executives:
  - Commission did not inform Intel of existence of meeting until after Intel found agenda
  - Commission then denied that record existed
  - Intel sent heavily redacted record as "courtesy"
  - GCEU eventually provided Intel with copy
  - But no procedural violation found since meeting "*informal*" and "*cannot be ruled out that Mr D1 provided the Commission with neutral evidence*" (¶647)

Procedure: CJEU findings

- Article 19 Reg 1/2003 covers any interview conducted for purpose of collecting information relating to investigation (¶84) so GCEU erred in "*informal*" interview conclusions
- Not cured by disclosing "internal note" since note excluded real content of interview (¶93)
- But no violation since not clear it made any difference to Intel's defence (¶99-100)
- Intel could have applied to summon Mr. D1 before GCEU

Procedure: Points of note

- Perverse incentives?
  - Not recording or giving copy of important meeting should lead to adverse inference against Commission
- Is GCEU really going to hear live witnesses?
- Being lax on procedure only justified if proper appeal on merits
- What does Commission must record "*in a form of its choosing*" mean?