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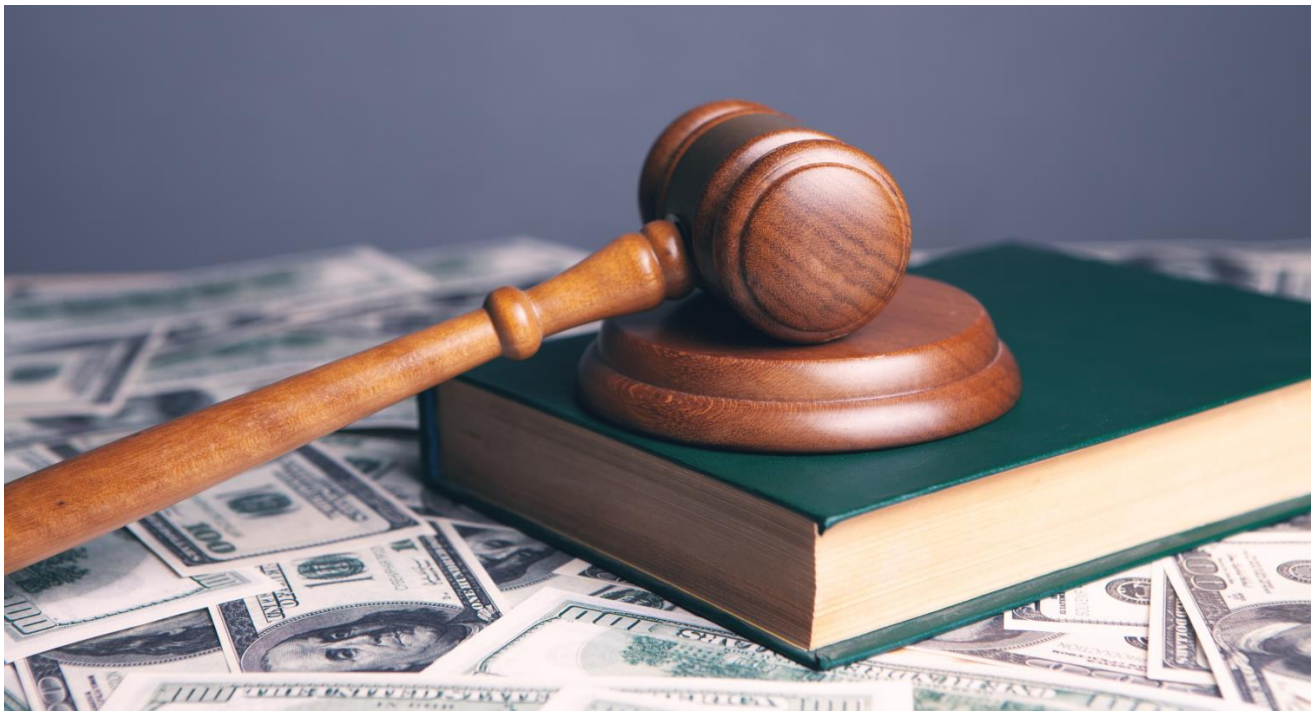

Newest Chapter in the Intel Case

3 February 2022

Introduction

The 26 January 2022, the General Court of the European Union gave its judgement in T-286/09 marking the end of this chapter of a story that began with the millennium.

The story has its earliest onset 18 October 2000 when Advanced Micro Devices (AMD) submitted a formal complaint to the commission regarding alleged abusive market behaviour by Intel Corporation, Inc (Intel).

The complaint led to the Commission launching an investigation culminating in the Commission adopting its decision of 13 May 2009 C-227/13, finding that Intel had made a continuous infringement during the years 2002-2007 of TFEU article 102 (at the time of the decision article 82) regarding abusive behaviour by a dominant undertaking. For conducting this infringement, the Commission imposed a giant fine of EURbn 1,06 on intel.

The Commission Decision

In its decision, the Commission found that Intel had a market share of 70% in the market of x86 processors and that the market was subject to very high berries of entry, i.e. among others the extremely high and time-consuming sunk cost of setting up manufacturing facilities for computer chips. Intel was therefore found to be dominant in the market.

The decision described two types of abusive market behaviour undertaken by Intel. Intel was found to have conducted behaviours which the Commission classified as Naked Restrictions which constitutes a restriction by object; that is behaviours which by their very nature is an infringement of article 102 TFEU. Such behaviour was in essence Intel paying OEMs (Intel's downstream customers), to postpone or cancel the launch of AMD products.

Further Intel was found to have awarded fidelity rebates to major OEMs, which was conditioned on those OEMs buying all or major parts of their supply from Intel. Fidelity rebates are also known as loyalty discounts or exclusivity rebates.

In line with at the time prevailing interpretation of the Hoffmann-La Roche (Hoffmann) case law,[1] the Commission found that the fidelity rebates were possible of having an exclusionary effect and lacked proficient objective justification, thereby constituting an abusive behaviour of Intel's dominant position, not requiring such effect to be proven or proven likely. Therefore, the Commission dismissed the necessity of carrying out an as-efficient-competitor (AEC) test to establish the infringement.

However, the Commission did carry out an AEC test that, though being criticised by Intel, concluded that not only had Intel's behaviours had a possible exclusionary effect, but such effect had in fact materialized.

The Litigation Proceedings

Disagreeing with the Commission's decision, Intel lodged an application at the Registry of the General Court on 22 July 2009, seeking the annulment of the decision. The main grounds in support of Intel's appeal related to the fidelity rebates, arguing that the Commission is required to carry out an analysis of the circumstance and prove at least a potential foreclosure effect; denying competitors profitable access to the market-by-market distortion.

The General Court dismissed the proceeding stating among others:

[1] Case 85/76, paragraph 89

"First of all, it should be recalled that a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case […]. *The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis."*[2]

Displeased with the outcome Intel brought an appeal before the Court (case C-413/14 P).

In the appeal proceedings, the Court stated that the Hoffmann case practice had to be clarified. The Court found that the Commission is obligated to carry out an analysis of the foreclosing abilities of the rebates at issue, thereby questioning the prevailing interpretation of the Hoffmann case law as applied by the General Court in its judgement.

The Court set aside the General Court's judgement and referred the case back to the General Court, which brings us to the 26 of January 2022 the date of which the General Court gave its new judgement in the case, clarifying the findings of the Court.

Second Judgement of the General Court[3]

The General Court firstly set the scope of the second judgment to be that of the fidelity rebates, excluding the Naked Restrictions as stated in the Commission's decision, from the proceedings, thereby upholding the Commission's findings, that the Naked Restrictions did constitute an abusive behaviour.[4]

The General Court then went on to clarify the meaning and scope of the Court's judgement in the appeal. The General Court explains that an undertaking's system of rebates, including that of fidelity rebates, may be characterised as a restriction of competition since the nature of such rebates can be assumed to restrict competition, which is in line with the Hoffman case-law. However, in line with the judgement in the appeal the General Court continues and states, that the assumption of fidelity rebates restricting competition is only that; a mere presumption and **not** an infringement by object of article 102 TFEU.

To prove that a system of rebates such as that at issue in the present case constitutes an infringement of article 102 TFEU, the Commission must assess the foreclosure capabilities of such rebates. Such assessment must consider five criteria; **1.** the extent of the undertaking's dominant position, **2.** the share of the market covered by the contested practice, **3.** the conditions and arrangements for granting the rebates in question, **4.** their

[2] T-286/09, paragraph 142.
[3] T-286/09
[4] T-286/09, paragraph. 95, 96 & 102.

duration and their amount and **5.** the possible existence of a strategy aiming to exclude competitors.[5]

The General Court affirmed the judgement in the Appeal and stated that the AEC test was vitiated by errors and that the Commission did not properly consider the criterion related to the market share covered by the concerted practise and the AEC test could therefore not constitute a suitable assessment of the foreclosing abilities of the rebates.

On those grounds, the General Court found that they were not in a position to determine if an infringement of article 102 TFEU had taken place and neither to determine the size of the fine related to the Naked restrictions. Therefore, the General Court annulled the entirety of the giant EURbn 1,06 fine originally imposed by the Commission.

Our Comments

As such, the judgement in the appeal and now the clarification from the General Court will be a welcome redefinition of the interpretation of the Hoffmann case law for many undertakings (especially undertakings having a dominant position).

However, it is important to keep in mind the merits on which the Commissions' decision was annulled. The annulment is based on an error in law and the clarification that fidelity rebates can only be assumed to have anticompetitive effects; not by their nature constituting an infringement of article 102 TFEU. Neither the judgement in the appeal nor the second judgement at the General Court can with certainty, be interpreted to materially alter the legality (or lack thereof) of dominant undertakings' fidelity rebate schemes.

It will be interesting in the coming years to see how the Commission will apply the five criteria set out by the Courts in assessing the foreclosure capabilities of such rebates, to what extent the criteria must be fulfilled and if it will be possible for undertakings to disprove the assumption that fidelity rebates by their nature have anticompetitive effects.

To that extent, it must be stressed, that both the Court and the General court found that fidelity rebates by their very nature can be presumed to have anticompetitive foreclosure effects and undertakings having a dominant position must still be careful and considerate, if entering the territory of fidelity rebates. Such an undertaking must be very certain of a benefit to the consumers or for efficiency, that can outweigh any anticompetitive effects.

[5] T-286/09, paragraph 119

It is highly likely that this is not the end of the Intel case, as the Commission must be assumed to take further actions, at least regarding the Naked Restrictions. Further, one can reasonably expect that the Commission will seek to prove the anticompetitive effects of the fidelity rebates, the anticompetitive effect of which was not the reasoning for the annulment. This could possibly be the first step in answering if thereafter the Intel cases, is a possibility for dominant undertakings to utilize fidelity rebates in their pricing strategies, or if their legal use is solely a theoretical possibility, as one would not be able to disprove the anticompetitive foreclosing presumption or justify such negative effects.

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