

The judgment in *Intel v Commission*:  
Is the "*Voice of Doom*" right?

Nicolas Petit, 10 July 2014, Belgian Competition Authority  
Liege Competition and Innovation Institute (LCII)

# Outline

---

1. The law on abusive rebates before *Intel*
2. The *Intel* judgment and its implications for the future assessment of rebates
3. Outstanding issues

# Purpose and findings of the presentation

---

## Purpose

- ▶ Check if *Intel v Commission* puts in place a new legal framework for the assessment of domcos' rebates
- ▶ Assess if the doomsayers have been right to lament the death of DG COMP's Guidance Paper

## Findings

- ▶ The *Intel v Commission* judgment is more severe than the Guidance paper, but it does not prohibit *per se* all conditional rebates
- ▶ In so far as rebates are concerned, the Guidance Paper remains good law, but price-costs benchmarks no longer safe harbours

# Exclusions

---

- ▶ No intention to discuss whether Intel was right or wrong on the facts
- ▶ Fines
- ▶ Jurisdiction
- ▶ Evidence, in particular on *de facto* conditional exclusivity

# Article 102 TFEU until the *Intel* judgment

---

- ▶ **Old case-law, forms-driven**
  - ▶ Hoffmann-La Roche, §90: “*fidelity rebates intended to give the purchaser an incentive to obtain its supplies exclusively from the undertaking in a dominant position are incompatible ... unlike quantity rebates*”
  - ▶ Pros (legal certainty and enforcement costs) and cons (type I errors)
- ▶ **Article 102 review**
  - ▶ 2005 discussion paper on exclusionary abuses + EAGCP report

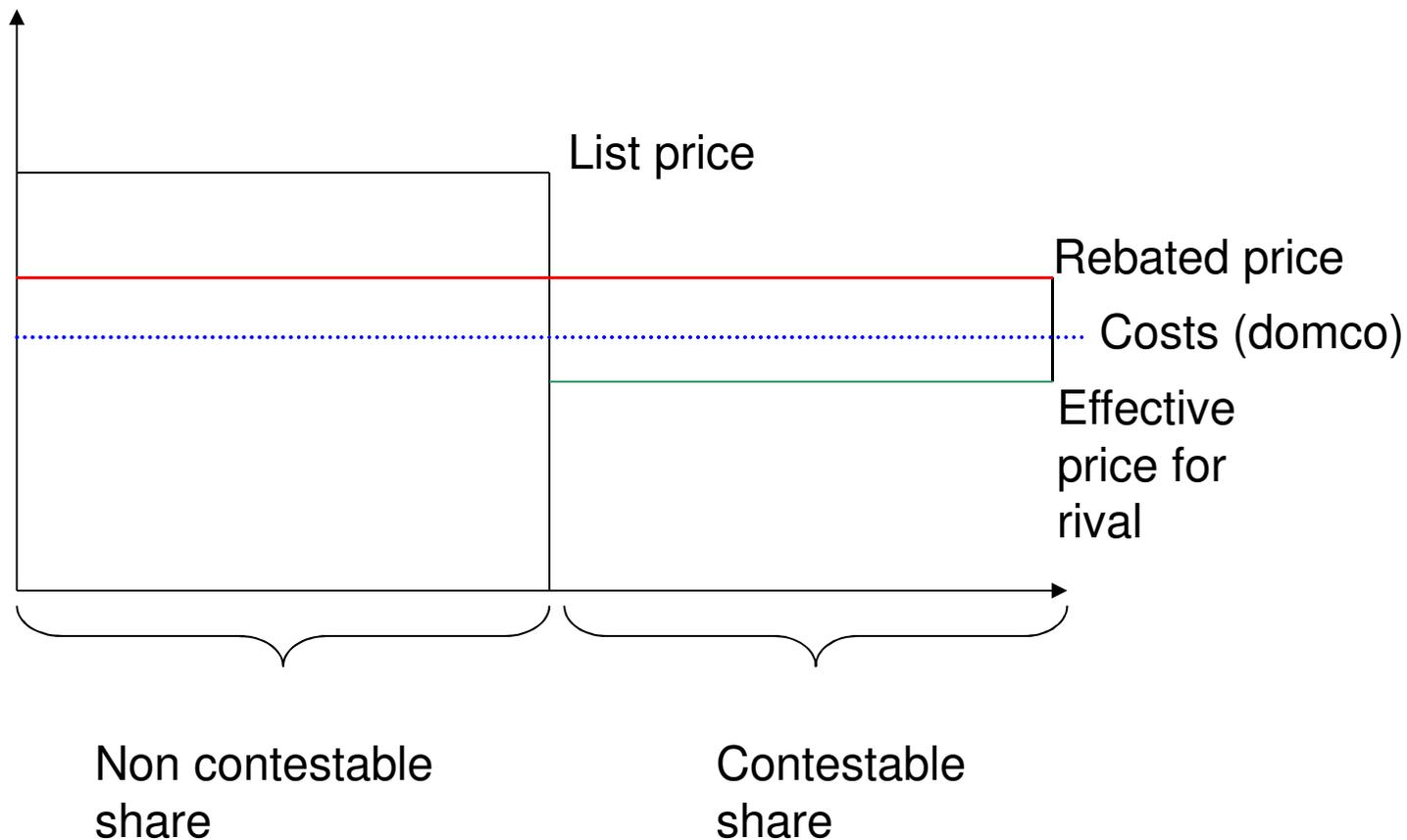
# Modernisation

---

- ▶ Adoption of Guidance Paper in 2009
- ▶ “*Effects based*” approach
  - ▶ Focus on exclusionary abuses
  - ▶ Focus on consumer welfare
  - ▶ Commission to devise a theory of harm, and test it
  - ▶ Price-costs tests + As Efficient Competitor (“AEC”) model
  - ▶ Efficiency defense
  - ▶ But for analysis
- ▶ Rebates
  - ▶ Conditional rebates
  - ▶ Retroactive or incremental

# Guidance Paper analytical framework for conditional rebates, §41

---



# Example

---

## ▶ Firm A

- ▶ Non contestable share of 70%
- ▶  $P=10\text{€}$  below 70;  $P=5\text{€}$  above 70
- ▶ Cost per unit= $5\text{€}$
- ▶ If customer X takes all with A, he pays 500; but if X takes 70 with A and switches 30 elsewhere, he pays  $700+150\text{€}$
- ▶ Multi-sourcing is more costly than single sourcing
- ▶ If firm B which is equally efficient wants to compete for 30, it must not only offer 30 at  $5\text{€}$ , but also compensate loss of  $5\text{€}$  on 70, ie  $350\text{€}$ : negative price

# Post adoption

---

## Assessment

- ▶ More liberal for domcos
- ▶ More costly for the agencies
- ▶ Aligned with other agencies (US)

## Questions

- ▶ Soft law: will the Commission apply it?
- ▶ Commission document: will the EU courts accept it? => *Tomra*
- ▶ DG COMP's brainchild: will the case-teams apply it? Will the Legal service defend it?

## 2. The *Intel* judgment and its implications

---

- ▶ Worldwide market for x86 CPUs (desktops, notebooks and servers)
- ▶ Two suppliers since 2000, Intel and AMD
- ▶ 4 important purchasers, Dell, HP, NEC and Lenovo (OEMs) + MSH (a retailer)
- ▶ Intel MS close to 70%, high barriers to entry
- ▶ 2 abuses between 2002 and 2007: rebates *de facto* conditional on exclusivity (incl. conditional payments to MSH) and « *naked restrictions* » (pay for delay with Acer and Lenovo; and pay for business desktops exclusivity with HP), fine of €1,06 billion

# The appeal

---

## Commission

- ▶ Conduct akin to fidelity rebates in the sense of old *Hoffmann-La Roche* case law (see §90, C-85/76) => “*fidelity rebates*”
- ▶ Absent an objective justification, such conduct constitutes abuse
- ▶ No need to establish “*actual or potential effects on a case-by-case basis*” (§71)

## Intel

- ▶ Commission should have assessed “*all the circumstances*” (*Michelin I*, §73) to see whether the rebates and payments “*were capable of restricting competition*”;
- ▶ Where conduct is historic, Commission to prove that there was “*actually*” foreclosure

# The judgment's proposed typology, §74

---

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality (refers to <i>Michelin II</i> )
Fidelity rebates (§76)	Rule of reason (implied predation + objective justification)	<i>Per se</i> illegality (refers to <i>Hoffmann La Roche</i> )
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (implied predation + objective justification)	Rule of reason (“ <i>consider all the circumstances</i> ” refers to <i>Michelin I</i> )

# The *per se* approach?

---

- ▶ According to GC, rebates granted to Dell, HP, NEC and Lenovo belong to 2<sup>nd</sup> category
- ▶ The GC also labels them “*conditional*” rebates, like the GP §76
- ▶ §80: the question whether it is abusive “*does not depend on an analysis of the circumstances of the case aimed at establishing potential foreclosure effects*”
- ▶ Precedent in *Hoffmann-La Roche*
- ▶ Exclusivity rebates are “*by their very nature capable of restricting competition*” (§85)
- ▶ “*The capability of tying customers to the (Domco) is inherent in exclusivity rebates*” (§86)
- ▶ Competitors' “*access is made more difficult*”, §88
- ▶ Not “*necessary to assess their effects on the market in their specific context*” when there is dominance, §89 (see also, §143)

## Or a limited *per se* approach? (1)

---

- ▶ Meanwhile, the GC imports some Guidance Paper reasoning
- ▶ §§92-93: prohibition of fidelity rebates because the dominant firm can use the non contestable share of demand as leverage to capture contestable share. Rivals must offer "*compensation for the loss of exclusivity rebate*", which makes their life "*more difficult*" (see also, §§103, 178)
- ▶ Non-leveraging rebates hence do not fall under the *per se* approach
- ▶ Upshot is that *per se* prohibition only applies to conditional "*retroactive rebates*"
- ▶ The conditional "*incremental rebates*" of the Guidance Paper shall thus fall within the third category

# The judgment, refined reading (2)

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality ( <i>Michelin II</i> )
Fidelity <b>retroactive</b> rebates (§76)	Rule of reason (quantitative price test + objective justification)	<i>Per se</i> illegality ( <i>Hoffmann La Roche</i> )
Fidelity <b>incremental</b> rebates	Rule of reason (quantitative price test + objective justification)	<b>Rule of reason</b>
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price test + objective justification)	Rule of reason (“ <i>consider all the circumstances</i> ” <i>Michelin I</i> )

# Rule of reason: harm v efficiencies

---

- ▶ *Per se* rule applies only to fidelity retroactive rebates
- ▶ Thus the GC's numerous pronouncements on harm primarily relevant for assessment of conditional retroactive rebates and less for other types of rebates
- ▶ On harm:
  - ▶ Sets the bar low: no quantitative assessment
  - ▶ As will be seen, on each of the components of the Guidance Paper's effects based approach, there is a reduction in the burden of proof or even an invalidation
- ▶ On efficiencies:
  - ▶ Things are unclear

# Theory of harm

---

## Guidance Paper

- ▶ Situation where "*effective access of actual or potential competitors to supplies or markets is hampered or eliminated*", §19
- ▶ "*Thus having an adverse impact on consumer welfare ... in the form of high price levels ...*", §19

## Intel

- ▶ Access to market is "*made impossible*", but also "*more difficult*" for competitors, §88

# Foreclosed rival: AEC or REC or LEC (1)?

---

- ▶ Guidance Paper: in principle AEC, save in "*certain circumstances*", a less efficient competitor, §§23-24
- ▶ GC:
  - ▶ Irrelevant question for exclusivity rebates, §143
  - ▶ "*Even if an assessment of the circumstances ... were necessary ... it would still not be necessary to demonstrate those effects by means of an AEC test*", §146
  - ▶ Moreover, true that AEC test with negative price suggests risks of foreclosure. But there can be foreclosure with positive prices too, because the AEC will be "*making access more difficult for competitors ... even if that access is not economically impossible*", §150
  - ▶ **Obiter**: for third category rebates, no need either for a "*quantitative test*", §144

# Foreclosed rival: AEC or REC or LEC? (2)

---

## Guidance Paper

- ▶ *"As long as the effective price remains consistently above the LRAIC ... the rebate is normally not capable of foreclosing in an anticompetitive way", §43*
- ▶ *When above AAC and below LRAIC, need further investigation, §44*

## Intel

- ▶ *"A positive price means only that an as efficient competitor is able to cover its costs. That does not mean that there is no foreclosure effect", §150*

# Market coverage (tied market share)

---

## Guidance Paper

- ▶ Relevant: *"in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect"*, §20

## Intel

- ▶ Irrelevant: *"The possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument. ... The Court of Justice has therefore rejected the application of an 'appreciable effect' criterion or a de minimis threshold for the purposes of applying Article 82 EC (Opinion of Advocate General Mazák in Case C-549/10 P Tomra, paragraph 73 above, point 17)"*, §116
- ▶ Significant foreclosure is not *"a necessary condition"*, §120
- ▶ 14% is significant, §194

# Customer coverage (tied purchases)

---

- ▶ Commission left market wide x86 CPUs for all types notebooks, desktop and servers
- ▶ But for OEMs, rebate only applied to certain CPUs
  - ▶ HP: 95% of corporate desktop requirement => 28% of HP total x86 CPU requirements!!!
  - ▶ Upshot is: no exclusivity rebate within meaning of *Hoffmann-La Roche*, §127
- ▶ §134: *"It follows that the rebates granted to HP must be regarded as exclusivity rebates, even though the quasi-exclusivity condition concerned only a segment of HP's requirements"*
- ▶ If you require exclusivity in a fraction of the relevant market/for a fraction of a customer requirement, then prohibited

# Size of rebate

---

## Guidance Paper

- ▶ *"The higher the rebate as a percentage of the total price, ... the stronger the likely foreclosure of actual or potential competitors", §40*

## Intel

- ▶ The 1 USD example
- ▶ Irrelevant, says the GC at §109

# Causal link

---

- ▶ Guidance paper's causality analysis: *"This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices"*, §21
- ▶ *Intel*:
  - ▶ No need, §104 (in response to argument that customers may have requested the rebates for business reasons)
  - ▶ No need §186 (in response to argument that AMD reported rapid growth rate with OEMs) => could have been better

# Empirical evidence (conduct is "*historic*")

---

## Guidance Paper

- ▶ Useful, "*if the conduct has been in place for a sufficient period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure*", §20

## Intel

- ▶ Intel maintains that Commission must prove "actual foreclosure effects";
- ▶ GC, "*even in the context of an analysis of the circumstances of the case, the Commission must only show that a practice is capable of restricting competition*", §103

# Economic analysis, for the sake of it...

---

## Guidance Paper

- ▶ §21: "when pursuing a case, the Commission will develop the analysis of the general factors mentioned in §20, together with the more specific factors described in the sections dealing with certain types of exclusionary conduct"

## Intel

- ▶ §§585-586: "It should be noted that, in order to find that the exclusivity rebates were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand (see paragraphs 80 to 94 above).
- ▶ "For the sake of completeness ... the Commission established that the MCP rebates were capable of restricting competition also on the basis of an analysis of the circumstances of the case at hand"

# Efficiencies

---

- ▶ §94: "potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers"
  - ▶ Reference to CJEU *Post Danmark*
  - ▶ Applies to three categories of rebates
  - ▶ Already in *Hoffmann-La Roche* at §90 through reference to Article 101(3) TFEU
- ▶ But unworkable in practice: how to balance with pro-competitive effects if anticompetitive effects have not been quantified in the first place? All the more so, since Domco's own costs are no longer a relevant benchmark
- ▶ Asymmetric rule of reason: Domco to argue efficiencies in the dark

# The judgment, refined reading (3)

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality ( <i>Michelin II</i> )
Fidelity <b>retroactive</b> rebates (§76)	Rule of reason (quantitative price test + objective justification)	<b>Quasi <i>per se</i> illegality (no harm verification + objective justification)</b>
Fidelity <b>incremental</b> rebates	Rule of reason (quantitative price test + objective justification)	<b>Asymmetric rule of reason (qualitative harm verification) + objective justification</b>
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price tests + objective justification)	<b>Asymmetric rule of reason (qualitative harm verification) + objective justification</b>

# Naked restrictions

---

- ▶ Labelled after the paper of Rasmusen *et al*, "Naked Exclusion", *American Economic Review*, 1991
- ▶ Intel granted payments to OEMs in order that the OEM delays, cancel or restrict the marketing of certain AMD-based products
- ▶ Practices with an "*anticompetitive object*", §§199, 203
  - ▶ // with pay for delay (Servier), but there horizontal whilst here, vertical restraint
- ▶ Falls out of competition on the merits, §205
- ▶ Targeted at AMD, §§204, 207
- ▶ No discussion of efficiencies, unlike for the impugned rebates

# Naked restrictions

---

- ▶ In §22 of Guidance Paper, naked exclusion is present
  - ▶ *"Conduct that can only raise obstacles to competition and that ... creates no efficiencies"*
  - ▶ *"Anticompetitive effects may be inferred"*
- ▶ Example: if the dominant firm *"pays a distributor or a customer to delay the introduction of a competitor's product"*

# The judgment, refined reading (4)

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality ( <i>Michelin II</i> )
Fidelity <b>retroactive</b> rebates (§76)	Rule of reason (quantitative price test + objective justification)	<b>Quasi <i>per se</i> illegality (no harm verification + objective justification)</b>
Fidelity <b>incremental</b> rebates	Rule of reason (quantitative price test + objective justification)	<b>Asymmetric rule of reason (qualitative harm verification) + objective justification</b>
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price tests + objective justification)	<b>Asymmetric rule of reason (qualitative harm verification) + objective justification</b>
Naked exclusion	<i>Per se</i> illegality	<b><i>Per se</i> illegality</b>

### 3. Outstanding questions

---

- ▶ Should DG COMP withdraw its Guidance Paper?
- ▶ Should Domcos worry?
- ▶ Should Intel appeal?
- ▶ Should NCAs be interested?

# Should DG COMP withdraw its Guidance Paper?

---

- ▶ **Yes**

- ▶ Precedents in the US, withdrawal of contentious DoJ Report on Section II of the Sherman Act
- ▶ Impact on related sections in Guidance Paper (leveraging abuses)

# Should DG COMP withdraw its Guidance Paper (2)?

---

## ▶ No

- ▶ But judgment says Guidance Paper may remain relevant outside the specifics of the "*present case*", §158
- ▶ No contempt of court, for the Guidance Paper "*is not intended to constitute a statement of the law*" and "*without prejudice to the interpretation [of the EU courts]*", §3
- ▶ Helpful self-assessment proxy for domcos in areas other than rebates + nice "*why*" paper (explains the theory behind the liability)
- ▶ Some of it was imported by GC (efficiencies)
- ▶ Case-specific setting (annulment proceedings), outcome of preliminary ruling could be different (see *Post Danmark I and II*) (see Ibanez, 2013)
- ▶ Some of the judgment may be wrong (see below)

## Should domcos worry?

---

- ▶ No, formalistic rules of prohibition are easy to bypass
- ▶ Avoid the quasi *per se* illegality box by redesigning contractual schemes to fall within third category
- ▶ Rather than requesting "*exclusivity*" in the contract or *de facto*, Domcos to second guess the amount of sales achieved by customers in a period, and set a sales target
- ▶ *Intel* judgment slightly increases the cost of *de facto* exclusive dealing, but falls far from making it impossible

# Should Intel appeal?

---

- ▶ Yes, because the judgment

- ▶ Makes its own interpretation of a number of CJEU precedents (eg, *Post Danmark*), which the upper court may disagree with
- ▶ Is based at several times on Opinions from AGs, which do not constitute strong precedents and which have not been clearly followed by CJEU (§§116 on *de minimis* and 150 on AEC)
- ▶ Even if one is to accept forms-based assessments, GC should not be tolerated to slip into putative formalism. See extraordinary statement of §134: "*the rebates must be regarded as exclusivity rebates, even though the quasi-exclusivity condition concerned only a segment of HP's requirements*"

# Should Intel appeal (2)?

---

- ▶ Yes again, because the judgment
  - ▶ uses and abuses the "*distinguishing method*" (Coutron, 2009)?
    - ▶ To distinguish from *DT* and *Post Danmark*, GC affirms "*The present case does not relate to a pricing practice*", §99
    - ▶ To distinguish from *Ice Cream* case-law, GC affirms that the VdBF judgment "*did not concern a practice by which a financial incentive was directly conditional*", §121
    - ▶ On proof and evidence of agreed-upon, de facto exclusivity, no reference to Article 101 TFEU case law on meeting of the minds
    - ▶ At times, the GC refuses to distinguish, see *Irish Sugar* on naked restrictions

## NCAs?

---

- ▶ NCAs not bound by Guidance Paper (see, by analogy, CJEU, *Expedia*)
- ▶ But why not do economic analysis for the sake of it?
- ▶ Very tied to vertical restraints policy

# Conclusions

---

- ▶ Anything that is abuse under the guidance paper test is abuse under the forms-based test; but anything that is abuse under the forms-based test is not abuse under the guidance paper test
- ▶ *Per se* illegality has pros, ie legal certainty; but so does *per se* legality 😊
- ▶ Edlin and Farrell, “Freedom to trade and the competitive process”, 2011 *NBER WP Series*
  - ▶ Article 102 TFEU as prohibition on firms attempts to restrain improving trade between their rival and customers, rather than on outcomes >< focus on process, instead of GP focus on outcomes; but still a need to prove an improving coalition