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Article 102 and rebates in a post-Intel world

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(speaking in a personal capacity - the views expressed are not necessarily those of the European Commission)
Legal standard under Article 102

- The debate on the legal standard under Article 102 TFEU has been ongoing for years
- In a nutshell, the debate is about how to balance an economically sound competition enforcement with administrability and speed of enforcement
- **Important caveat**: irrespective of the legal test, the Commission has over the years always analysed (potential) effects
Legal standard & conditional rebates

■ Main battleground so far has been in conditional rebate cases:
  ■ Relatively wide-spread conduct
  ■ Well-developed case law
  ■ Economically established that rebates can have both pro- and anti-competitive effects

■ Main point of contention is whether effects can be presumed on the basis of the typology of rebates (e.g. exclusivity rebates) or whether a detailed (quantitative?) analysis must be carried out
Intel: the General Court judgment

- Specified that anti-competitive effects can be presumed from the conduct
  - No need to carry out an analysis of the individual circumstances
- In case potential effects would need to be demonstrated, the Commission successfully did so via its qualitative and quantitative assessment
- No need to conduct an as-efficient competitor (AEC) price-cost test: Commission's analysis not examined
**Intel: the ECJ judgment (1)**

- Considers conditional rebates as pricing practices, which are illegal when they are capable of foreclosing as-efficient competitors.
- Confirms that a presumption of illegality applies to exclusivity rebates by a dominant company.
- However, clarifies that in case of substantiated submission by the dominant company, an analysis of potential effects has to be carried out.
Intel: the ECJ judgment (2)

- List of factors to be considered (para 139):
  - Extent of dominant position
  - Market coverage
  - Conditions, arrangements, duration and amount of rebates
  - Possible existence of a strategy aiming to exclude

- Price-cost AEC test is not mentioned in para 139, but implicitly recognised as possible tool to prove effects
Some answers, more questions…

- Does the Commission need to consider all elements referred to at para 139?
- Are there other elements that can be taken into account? If so, which ones are those?
- Does dismissing the evidence submitted by DomCo always equate to proving effects?
- What does "as-efficient" mean? (see para 134)
- Does Intel apply to non-pricing conduct?
- What is the role of the Guidance Paper?
Commission cases post-Intel

- Commission post-Intel enforcement action will likely be key in shaping future policy on conditional rebates (and Article 102 more in general)

- Most relevant cases:
  - Qualcomm
  - Google Android
  - Google AdSense (ongoing)
QUALCOMM
Baseband chipsets (BCs)

• BCs process all cellular communications functions in smartphones and tablets

• Both voice and data transmission

• BCs incorporate different technologies, e.g. 4G (LTE), 3G (UMTS), 2G (GSM)
Qualcomm's dominance

- Qualcomm held a dominant position in the market for LTE baseband chipsets at least in the time period 2011-2016 based on particular on:
  - very high worldwide market shares, amounting to more than 90% for the majority of the period under investigation
  - barriers to entry and expansion, including:
    - R&D expenditure required before a supplier can launch an LTE chipset
    - Qualcomm's network of pass-through rights to third parties' intellectual property
    - Qualcomm's brand and established business relationships
    - The fact that it is important for baseband chipsets to support a variety of cellular communication standards
The conduct

- In 2011, Qualcomm and Apple signed an agreement according to which Qualcomm committed to grant significant payments to Apple.
- Qualcomm's payments were conditional on Apple exclusively sourcing baseband chipsets for its "iPhone" and "iPad" devices from Qualcomm.
- In 2013, the agreement was amended and extended to the end of 2016.
Abuse

- Qualcomm's payment are exclusivity payments
- Presumption of anti-competitive effects
- During the administrative proceedings, Qualcomm submitted, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects

Decision
- Analyses potential anti-competitive effects
- Rebuts Qualcomm's arguments (both on price-cost AEC test and alleged efficiencies)
Sources of evidence

- The extent of Qualcomm's dominant position
- Amounts paid on condition of exclusivity were significant
- Exclusivity condition: Qualcomm's payments reduced Apple's incentives to switch to rivals
  - confirmed by a broad range of contemporaneous evidence
  - Apple gave serious consideration to switch in part to Intel
- Apple is a key customer for baseband chipset suppliers
  - accounts for a significant share of LTE chipset demand
  - leading smartphone manufacturer which can influence other customers' and manufacturers' procurement and design choices. By foreclosing Apple's demand, Qualcomm's conduct had an effect on the LTE baseband chipset market as a whole
Role of the Guidance Paper

- The Commission is not required to assess the legality of Qualcomm's conduct in accordance with the Guidance Paper.
- Qualcomm did not show that it legitimately relied on the Guidance Paper.
- Qualcomm's exclusivity payments satisfy the criteria set out in the Guidance Paper for being dealt with by the Commission as a priority.
- In any event, Commission assessed the price-cost test submitted by Qualcomm and concluded that such test failed to support Qualcomm's position.
Google developed its business model in the **PC** environment, where the **web browser** is core entry point of Internet.

In mid '00, improvements in the Internet industry began to **shift its focus** from PCs **to smart mobile devices**.
Summary of infringements

This case is about Google protecting and strengthening its dominant position in search by:

- **Tying** the Google Search app with the Play Store and by **tying** Google Chrome with the Play Store and the Google Search app;
- Making the licensing of the Play Store and the Google Search app conditional on device manufacturers agreeing to **anti-fragmentation obligations**; and
- Granting **revenue share payments** to device manufacturers or mobile network operators on condition that they did not pre-install any rival search engine on any device within an agreed portfolio.
Market definition and dominance

➢ Google holds a dominant position in the following markets:
  • Worldwide (excluding China) market for licensable smart mobile operating systems;
  • Worldwide (excluding China) market for Android app stores;
  • National markets for general search services in the EEA.

➢ Apple is not a direct competitor of Google in any of these markets

➢ Commission assessed and dismissed Apple's "indirect constraint" on Android and the Play Store
Infringements: tying

- Google Search app and the Google Chrome browser are the two most important entry points for search traffic on mobile devices.

- Using its dominance in Android app stores and general search, Google imposed contractual conditions on manufacturers, via Mobile Application Distribution Agreements (MADAs), such that:
  - they had to pre-install Google Search if they wanted to sell devices that offer the Google Play Store;
  - they had to pre-install Google Chrome if they wanted to sell devices that offer the Google Play Store and Google Search.

- These practices foreclosed competing internet search and browser providers.
Infringements: anti-fragmentation

- By means of anti-fragmentation agreements (AFAs) with manufacturers, Google made sure that they only use Google's version of Android and not any 3rd party versions, so-called Android forks
  - Manufacturers were not allowed to sell even a single device based on an Android fork if they want to sell any devices with the Play Store or Google Search pre-installed
- That closed off the possibility for devices with such Android forks to be sold, and for rival search engines and others to launch their services on such devices
- In 2012 and 2013, Amazon attempted to license its Fire OS, an Android fork, to a number of manufacturers but this venture did not go ahead due to the AFAs
Infringements: revenue sharing

- Google entered into Revenue Share Agreements (RSAs) with major manufacturers and mobile network operators, giving them a share of its search revenues, on condition that they exclusively pre-installed Google Search on all their Android devices.

- The tying conduct ensures pre-installation of Google Search; revenue sharing ensured no rival search service was pre-installed on Android devices.

- Evidence of foreclosure based *inter alia* on:
  - Coverage
  - Price-cost AEC test
  - Internal documents
CONCLUSIONS
Conclusions

- The Intel judgment brings clarity, but the way it will be interpreted matters for the development of EU competition law enforcement.

- Such interpretation needs to be legally sound and must not preclude effective enforcement.

- Qualcomm and Google Android demonstrate that:
  - The Commission can prove anti-competitive effects in a number of ways.
  - There is no hierarchy between different types of evidence: depends on the case and the evidence.
  - An AEC test is a tool, among many, that can be used to demonstrate effects.