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BRIEF

Antitrust Enforcement in Europe after *Intel* and *Cartes Bancaires* - A Kind of Trouble to Enjoy

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Abstract

On 20 April 2018 the Robert Schuman Centre for Advanced Studies and Assonime jointly organised a workshop at the European University Institute's (EUI) campus in Florence. The title of the event was 'Antitrust enforcement in Europe after *Intel* and *Cartes Bancaires*, a kind of trouble to enjoy'. The conference discussed the impact of the rulings of the EU Court of Justice (CJ) in *Intel*¹ and *Cartes Bancaires*² on competition law enforcement at the national and the EU level. The event was opened with a keynote speech that was delivered by Svend Albaek, Deputy Chief Economist of the DG Competition of the European Commission. The workshop included two panels, which dealt, respectively, with fidelity rebates after *Intel*, and vertical agreements after *Cartes Bancaires*. A final roundtable discussion concluded the event and debated the assessment of legal and economic 'context' in EU competition law enforcement. The event gathered representatives from National Competition Authorities (NCAs), the European Commission, academia, industry, as well as law and economic consulting firms. The diversity of views ensured a lively debate. This Policy Brief summarises the main points that were raised during the discussion and seeks to stimulate further debate.

1. Case C-413/14, *Intel v. European Commission* (2017) ECLI:EU:C:2017:632.

2. Case C-67/13, *Groupement des Cartes Bancaires v. European Commission* (2014) ECLI:EU:C:2014:2204.



I. Exclusive Dealing and Loyalty Rebates After *Intel*

On 6th September 2017, the CJ delivered its long-awaited ruling in *Intel*. The case originated from an annulment proceeding against the 2009 EU Commission Decision that sanctioned Intel under Art. 102 TFEU.³ The firm was fined €1 billion by the EU Commission for having abused its dominant position in the x86 central processing unit (CPU) market. In particular, Intel granted fidelity rebates, and made direct payments, to computer manufacturers, who installed CPUs in their hardware that were manufactured by Intel. According to the EU Commission, such practices were aimed at excluding AMD (i.e., Intel's main competitor) from the CPU market. In the first instance ruling, the EU General Court upheld the EU Commission's Decision.⁴ By contrast, on appeal, the CJ annulled the Decision and referred the case back to the GC, where the case is currently pending.

The ruling is relevant since the CJ openly endorsed a more effect-based approach to Art. 102 assessment, and the Court decided on the case as a Grand Chamber. On the one hand, the CJ stressed that the objective of Art. 102 TFEU is neither to prevent an undertaking from acquiring a dominant position 'on its own merit', nor to safeguard 'less efficient competitors'.⁵ On the other hand, the Court confirmed the well-established *Hoffmann La Roche* case law, whereby a fidelity rebate is presumed to be in breach of Art. 102.⁶ However, the CJ also emphasised that such case law should be 'further clarified'.⁷ In particular, if during the investigations the dominant firm puts forward 'supportive evidence' to justify its conduct, the EU Commission is required to analyse the 'effect'

of the conduct on the market. In particular, the EU Commission is required to analyse:⁸

- the extent of the firm's dominant position in the market;
- the share of the relevant market that is covered by the contested practice;
- the conditions for granting the rebate;
- the duration and amount of the rebate;
- the possible existence of a strategy by the defendant that aims to exclude competitors "that are at least as efficient as the dominant undertaking".

In *Intel*, the Court, while confirming the objective nature of the concept of abuse under Art. 102 TFEU, for the first time, adds that the dominant firm can rebut a presumption of abuse if it provides 'supportive evidence' to show the legality of its conduct. In such a case, the EU Commission will have to analyse the effect of the conduct on the competition dynamics in the market. In particular, the EU Commission will have to assess the conduct 'capacity' to foreclose from the market a competitor that is 'as efficient as' the dominant firm.⁹

The use of the 'As Efficient Competitor' (AEC) test for the assessment of rebates was considered by the EU Commission in its 2009 Guidance Paper in order to refine the scope of its investigations under Art. 102.¹⁰ In *Intel*, the Court annulled the previous GC ruling because, in its 2009 Decision, the EU Commission had relied on the AEC test, while, on appeal, the GC did not take into consideration Intel's arguments which challenged the application of this test by the EU Commission.¹¹

The *Intel* case has left a number of open questions, which were the subject of lively debate during the workshop:

3. European Commission Decision, COMP/C-3/37.990, *Intel*. Published in Brussels on 13.5.2009. OJ C-227/13, 22.9.2009.

4. Case T-286/09, *Intel Corporation v. European Commission* (2014) ECLI:EU:T:2014:547.

5. *Supra, Intel*, para. 133.

6. *Supra, Intel*, para. 137.

7. *Supra, Intel*, para. 138.

8. *Supra, Intel*, para. 139.

9. *Supra, Intel*, para. 140.

10. Communication from the Commission, Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C-45/7, 24.2.2009.

11. *Supra, Intel*, para. 147.



- Is the clarification provided in *Intel* a matter of substance or of procedure? According to the participants, *Intel* has consequences for EU competition law enforcement, both from a substantive and from a procedural point of view. The case *de facto* overrules well-established CJ case law in *Hoffmann La Roche*, since it recognizes that exclusivity rebates should not be condemned *per se* but should be analysed within their economic and legal context. On the other hand, *Intel* also has important consequences from a procedural point of view, since it introduces a rebuttable presumption of abuse. Consequently, during the investigations, the dominant firm will always try to put forward several arguments in order to justify its conduct.
- What is the meaning of ‘capacity to foreclose’? During the workshop, participants extensively debated whether, in *Intel*, the CJ introduced a minimum threshold to assess the capacity of the anti-competitive conduct to foreclose the market. There was disagreement among the panelists on whether, and to what extent, the EU Commission will have to consider all of the factors mentioned in para. 139 of the *Intel* ruling so as to assess the capacity to foreclose. In particular, it remains unclear whether the EU Commission will always have to prove the existence of a foreclosure strategy by the dominant firm. Furthermore, there was also disagreement among the participants on the ‘substantive evidence’ that the dominant firm will have to put forward in order to rebut the abuse presumption: some panelists argued that, after *Intel*, the EU Commission will always have to analyse the economic and legal context in accordance with the criteria mentioned in para. 139, while others stressed that the EU Commission could, in theory, reject the supportive evidence put forward by the dominant firm as being insufficient to rebut the presumption of abuse, and thus would need to carry out an object-based analysis.
- What is the value of the AEC test after *Intel*? Participants debated on whether, and to what

extent, the AEC test becomes compulsory in every Art. 102 case after *Intel*. In *Post Danmark II* the CJ states that in particular cases Art. 102 should protect also “not yet as efficient competitors” and thus the AEC test would be irrelevant. These situations, however should be strictly circumscribed in order to preserve the right of the dominant company to compete on prices. For conditional rebates, the case-law suggests that the AEC test is not necessary but represents a possibility. On the other hand, in *Intel* the CJ argues that if the test has been carried out by the undertaking, it should be considered by the review court.

A final aspect that was debated during the workshop concerned the impact of the *Intel* ruling on national competition law enforcement. In particular, the impact of *Intel* on competition law enforcement in Italy and the UK was discussed during the event. The *Autorità Garante della Concorrenza e del Mercato* (Italian NCA) has traditionally followed an effect-based analysis in cases of abuses investigated under Art. 102. In *Unilever*¹² and *Poste Italiane*,¹³ the Italian NCA has recently followed the wording of *Intel*. Both cases concerned fidelity rebates granted by the dominant firm in order to exclude competitors; both cases were decided upon by the Italian NCA after the CJ ruling in the *Intel* case. In particular, in *Poste Italiane*, the Italian NCA carried out the AEC test, concluding that a competitor as efficient as the dominant firm could not match the offer provided by *Poste Italiane* to its customers. Similarly, in *Unilever*, the Italian NCA carried out the AEC test, and concluded that the exclusionary agreements and fidelity rebates were part of a complex strategy carried out by Unilever to exclude small competitors from the market for impulse ice-cream.

12. <http://www.agcm.it/en/newsroom/press-releases/2441-al-gida-ice-creams,-fine-of-over-60-million-euros-to-unilever-for-abuse-of-dominant-position.html> (23.4.2018).

13. <http://www.agcm.it/en/newsroom/press-releases/2442-poste-italiane,-fines-of-over-20-million-euros-for-abusive-conduct-over-big-business-customers.html> (23.4.2018).



The application of a more effect-based approach to Art. 102 is also visible in the closure decision that was adopted by the UK Competition and Market Authority (CMA) in August 2017, in the *Unilever* case.¹⁴ The CMA decided to stop the investigations concerning an alleged scheme of fidelity rebates granted by Unilever to its distributors of impulse ice-cream. Unlike the Italian case, the scheme was implemented only during the winter months (i.e., February and March); a period in which the consumption of ice-cream is rather low in the UK. According to the British NCA, the rebates were aimed at preserving a minimum level of ice-cream distribution during the winter period, but they did not have any impact on Unilever's market share. Consequently, the rebate scheme did not have an anti-competitive effect in the market.

II. Vertical Agreements After *Cartes Bancaires*

In the second session of the workshop, the impact of the *Cartes Bancaires* (hereinafter 'CB') judgment on the application of Art. 101 TFEU was discussed. The case originated from an infringement decision, adopted by the European Commission in 2007, against the largest association of credit institutions operating in France for a new compensation fee that banks, mostly issuing new debit cards (i.e., issuing banks), had to pay to banks, who mostly provided a cash withdrawal services (i.e., acquiring banks). According to CB, the new compensation scheme was needed to ensure a fair balance among the financial institutions operating in the French banking market. By contrast, according to the EU Commission, the main purpose of the practice was to keep the price of payment cards artificially high, to the detriment of new entrants, as well as consumers. The decision was appealed before the GC, which upheld the Commission's position, and, in turn, before the CJ. The CJ quashed the GC's decision and referred the case back to it for judgment.

14. <https://www.lexology.com/library/detail.aspx?g=4a-c6e7a5-87c1-470c-9ee5-707667969c80> (23.4.2018).

As stated by Advocate General Wahl, with this landmark judgment the CJ has had the opportunity to 'refine its much debated case-law on the concept of restriction by object'.¹⁵ Following a well-settled line of reasoning that was developed in *Allianz Hungária*,¹⁶ the Court held that, leaving aside the cases which are very likely to produce negative effects, such as the horizontal price-fixing cartels, the analysis of the effects of the conduct is necessary for the application of the prohibition laid down in Art. 101(1) TFEU for that type of coordination, which does not reveal a 'sufficient' degree of harm to competition.

The determination of the boundaries of the qualification as a (*prima facie*) 'by object' restriction has traditionally been crucial to the competition law debate as a result of the impact that it has on the burden of proof in Art. 101 cases. Although the scope of the analysis to be carried out according to the CJ's test that was proposed in *CB* remains disputable, due to the confusion it may create with the conceptual category of 'effects',¹⁷ the judgment takes place against the background of a wide acknowledgment of the fact that 'the anticompetitive object of an agreement may not be established solely using an abstract formula'.¹⁸ At the same time, it was noted that it rejects the lower standards that were adopted in both *Pierre Fabre*¹⁹ and *T-Mobile*,²⁰ by conveying a

15. Opinion of Advocate General Wahl, delivered on 27 March, 2014, para 3.

16. Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (2013), ECLI:EU:C:2013:160.

17. Ketzi Zukakishvili, *Luxury (by) object and the effects of silence of the Court of Justice in Coty*, College of Europe, Department of Legal Studies Case Notes, 2018.

18. Opinion of Advocate General Mazak delivered on 3 March 2011, in Case C-439/09, *Pierre Fabre*, ECLI:EU:C:2011:113, para 26.

19. Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* (2011), ECLI:EU:C:2011:649.

20. Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (2009), ECLI:EU:C:2009:343.



narrower conceptual interpretation of the 'by object' category.

Bearing in mind that, so far, similar ideas have been supported only by some opinions from Advocate Generals, participants agreed that it is the first time that the Court has held such a rigorous position. The debate thus focused on the determination of the existence of a 'sufficient' degree of harm to competition, which, according to the CJ's line of reasoning, would require analysis of both the content and the objectives of the provisions of the agreement, in addition to the economic or legal context in which it takes place. In turn, taking the latter into consideration should enlarge the analysis to a series of elements, such as the nature of the goods and services affected, the conditions, the functioning, as well as the structure of the market(s) that are at stake.²¹ This should apply, in particular, to that type of coordination which involves interactions between the facets of two-sided systems, regardless of whether the restriction takes place on one side only.

At this stage of the debate, it was noted that the Court's view may favor the adoption of a sliding scale-approach that is based on the type of conduct which is to be analysed, whereby a first small set of simple object cases would exist, and a second one that requires an in-depth legal or economic assessment that calls upon the detection of more complex objects, and, finally, a third type that requires the examination of effects. Subsequent case law has further clarified the different phases of the assessment that is required to establish whether a 'by object' infringement has occurred. In *Toshiba*, the opinion of Advocate General Wathelet pointed out that the analysis of the context should not go as far as an examination of effects.²² Furthermore, although he held that it is essential to fully understand the economic function and real significance of a given agreement, he also argued that such an assessment

should apply only to those types of conduct that are different to classic restrictions of competition, such as cartels, that feature either complex or atypical characteristics, or that are not referred to at all in Art. 101(1).

The *CB* judgment has certainly left some room for further debate. First, reference was made to the role played by the parties' intention, which can be regarded as being embodied in the 'object' category in the case of hardcore restrictions. Overall, it was remarked that, traditionally, it has been considered insufficient by itself to prove the existence of a 'by object' infringement. While Advocate General Wahl's conclusions mirror this consolidated position,²³ the Court has been much more indulgent in this respect: and no direct relevance is attributed to the intent although it can be regarded as an additional element to be taken into consideration for the purposes of the overall assessment.

A second point raised during this part of the discussion dealt with the qualification of the 'legitimate objective'. Participants agreed that the Court decided not to take a definitive position on this point. On the one hand, A.G. Wahl's opinion leans toward regarding this element as being irrelevant for the establishment of the infringement. On the other hand, some of the CJ's statements in *CB* made some commentators argue that it is not very clear whether the 'legitimate objective' may have a role under Art. 101(3), whenever it is associated with efficiencies, consumer benefits or redeeming virtues. While this line of reasoning seems to be at odds with the position expressed in *Pierre Fabre*, in which the Court explicitly admitted that restrictions by object can be 'objectively justified' within Article 101(1), it would be compatible with the decision rendered in the *Irish Beef* case²⁴, in which the Court had the

21. Para 53 of the *Cartes Bancaires* Judgment.

22. Case C-373/14P, *Toshiba v European Commission* (2016), ECLI:EU:C:2016:26, para 74.

23. In its opinion (para. 110), Advocate General Wahl stated that "any intentions expressed by the participants in a supposed restrictive agreement, decision or concerted practice, like any legitimate objectives pursued by them, are not directly relevant".

24. Case C-209/07, *Competition Authority v Beef Industry*



opportunity to state that '[i]t is only in connection with Article 101(3) that [other legitimate interests] may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 101(1)'.²⁵

Another strand of the debate dealt with the implications that *CB* had on matters related to vertical restraints, focusing on the most recent case-law dealing with online selective distribution agreements. In *Coty*,²⁵ the CJ found that the prohibition imposed by suppliers of luxury goods on their authorized distributors from selling on a third-party internet platform in a selective distribution system, cannot be regarded as caught by Article 101(1), under certain circumstances. Following the conditions that are stated in the *Metro*²⁶ case, this reasoning should apply, provided that the prohibition 'has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued'. It was noted that the case originated from a preliminary ruling request, submitted by the Higher Regional Court of Frankfurt am Main, to clarify whether online marketplace bans, in the context of a selective distribution system, constituted 'hardcore restriction[s] by object'. Although the Court has not been specific on this point, its approach analyses two different categories separately, showing that the ambiguous use of the terms, as they were interchangeable, is incorrect, probably following *CB*, and strongly indicating that an online marketplace ban is not a restriction by 'object' within the meaning of Art. 101(1). Furthermore, it explicitly states that it does not amount to a hard-core restriction within the meaning of Article 4 of the Vertical Block

Exemption Regulation,²⁷ either when it does not limit passive sales or the customers to whom the distributor can sell the product. Certainly, the ruling is quite different from that in *Pierre Fabre*, which was confined to the specific circumstances of the case. However, participants agreed on the fact that is not very clear whether the ruling should apply to non-luxury goods.

Finally, it was pointed out that other cases exist wherein a very interesting tension between 'object' and 'effects' has been recorded. In a judgment dealing with patent settlement agreements in the pharmaceutical sector, the UK Competition Appeal Tribunal (CAT)²⁸ opined on, and ultimately referred to the CJ, the assessment of 'by object' restrictions, which, in its view, should focus on 'determining the potential effect of the agreement, having regard to its nature and its context, rather than on establishing on the facts what are, or were, its likely effects'. Although the Tribunal had a chance to clarify that the potential effect should be realistic and be capable of materially harming competition, the main conclusion was that the assessment may involve 'some consideration of potential effect in the overall market context'.

During the last part of session II, participants agreed that further interesting developments may occur in the new digital environment, with the main consequence being to make it hard to draw a clear distinction between the conceptual categories of infringement by 'object' and by 'effect', not, ultimately, because one cannot rely on 'common experience' with reference to the empirical effects of the majority of agreements in such a new environment.

Development Society Ltd and Barry Brother (Carrigmore) Meats Ltd (2008), ECLI:EU:C:2008:643.

25. Case C-230/16, *Coty Germany v Parfümerie Akzente* (2017), ECLI:EU:C:2017:941.

26. Case 75-84, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* (1986), ECLI:EU:C:1986:399.

27. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1–7).

28. *Generics UK Limited Glaxosmithkline PLC v Competition and Markets Authority* (2018) CAT 4, Case Nos: 1251-1255/1/12/16.



III. The Assessment of the Economic and Legal Context in Practice

The third session dealt with the most important implications of the two judgments. It was noted that they both encompass a systematic view that refuses a formalistic approach, calling upon a careful examination of the ‘impact’ that is attributable to potential antitrust infringements. Light was shed on the fact that assessing such an impact, regardless of whether it is actual or potential, against competition variables on a case-by-case basis is not necessary for ‘by object’ restrictions. Yet, following AG Wahl’s indications in *CB*, it may be determinant in so far as experiencing it in a market can ease the decision about whether a given type of coordination falls under the scope of the application of Art. 101(1). Furthermore, after *Intel*, this type of approach, including a solid reliance on a proper theory of harm, is required in order to apply Art. 102 to all types of price-based conduct, including exclusivity rebates.

At this stage of the debate, participants submitted the idea that the most prominent heritage of the two judgments lies in the opportunity to exclude the unlawfulness of hardcore restrictions that are different to cartels, when their lack of the capability to restrict competition is proven. This means that NCAs will have to take into serious consideration the arguments brought by the parties in an effort to rebut the allegation of infringement, showing that no adverse impact on competition variables was produced. At the same time, it was widely acknowledged that this evidence should be case-specific; furthermore, no abstract argument should be allowed. An open issue which is likely to generate further interesting discussions in the near future refers to the features of the impact itself. As competition is a multidimensional dynamic process, the ideal economic analysis would not be confined to price only but, rather, would consider a good range of variables, such as quantity, quality, choice, variety and innovation, both in the long and the short run.

As the assessment of the economic and legal

contexts are crucial to this scenario, economists may certainly play an important role. The same applies to national courts, where the parties will have to bring arguments to support such an impact-based approach. In this respect, participants agreed that it is becoming increasingly important to train judges in order to provide them with the necessary skills that are needed to understand and fairly assess the parties’ allegations of proof.

It was then remarked that the adoption of a more structured approach in the assessment of the economic and legal contexts should increase the predictability of the screening, which may be based on checklists that are useful for drawing boundaries around the ‘by object’ box. The list would not be exhaustive, since, in several cases, specific features of the market may exclude the risk of harm. Relying on a set of economic recipes would certainly make such an assessment more rigorous. It was thus recalled that this solution seems to be the one animating the ongoing debate on merger policy in Europe, which started with a proposal for the reform of turnover thresholds, because of their lack of direct relationship with harm, and continued with the most recent literature, which increasingly identifies market concentration as an innovation killer, and which is based on a purely economic analysis.²⁹

Participants concluded that the hardest way forward must rely on a unifying ‘Cartesian’ theory that encompasses both law and economics. In this respect, it was remarked that such a view has already been endorsed in several discussions at the DG Competition level. Indeed, the clarification of some of the relevant aspects of the debate may have to be left to political forces.

29. G. Federico, G. Langus and T. Valletti, *Horizontal mergers and product innovation*, International Journal of Industrial Organisation, Vol. 59, 2018.

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