

CLIENT ALERT

EU Antitrust: Intel Judgment – Court Signals End of Per Se Abuses of Dominance and Calls €1.06 Billion Fine into Question

September 6, 2017

In a surprise judgment that will come as a blow to the European Commission's ongoing cases against Google, the EU Court of Justice (CJEU) has referred the Commission decision imposing fines of €1.06 billion on Intel back to the General Court for rehearing.

The judgment has far-reaching implications for abuse of dominance cases generally. The CJEU rejects the application of a per se standard of illegality, requiring a much more detailed examination of the facts in each case. The impact will be to greatly expand the defence arguments available to dominant companies and increase the burden of competition authorities and litigants seeking to establish abuse.

The case arises from the Commission's 2009 decision against Intel finding that it had abused its dominant position in the market for x86 CPUs. The Commission identified two forms of abuse. First, Intel had granted rebates to four lap-top manufacturers (Dell, Lenovo, HP and NEC) on condition that they purchase all or almost all of their x86 CPUs from Intel. Second, Intel made payments to certain manufacturers on condition that they would delay, cancel or restrict the launch or marketing of laptops containing CPUs produced by Intel's competitor AMD.

Intel appealed, but in 2014 the EU General Court upheld the Commission's findings. In particular, it held that the rebates granted to Dell and others constituted exclusivity rebates and that no analysis of the circumstances of the case was required in order to find that such rebates were capable of restricting competition. In effect, it found that exclusivity rebates constituted a per se abuse of dominance.

In today's judgment, the CJEU rejects this approach. Specifically, the CJEU holds that if a dominant undertaking submits evidence that its conduct is not restrictive of competition, the Commission must assess:

- The capacity of the practice to foreclose competitors – including the proportion of the market covered by the practice, the duration and amount of the rebates, as well as any evidence of a strategy aimed at excluding competitors; and
- Whether any foreclosure effect might be outweighed by efficiencies that benefit consumers.

The CJEU emphasizes at a number of points that the purpose of EU antitrust rules is not to protect competitors that are less efficient than the dominant company. This could suggest the Commission should conduct an as efficient competitor (AEC) test in all cases. Here, since the Commission did in fact carry out a detailed AEC test, the General Court was obliged to examine Intel's arguments in relation to that test (but failed to do so).

The judgment is likely to spark debate as to the extent to which the Commission, and other European competition authorities, will now be required to conduct a full effects analysis in all abuse of dominance cases. In principle, the judgment does not quite go that far. At least in the case of exclusivity rebates, the Commission is only obliged to consider effects where the dominant company produces evidence that its behavior was not capable of restricting competition, or perhaps gives rise to off-setting efficiencies. However, since such issues are routinely raised by defendants in dominance cases, the increased burden on the Commission is likely to be significant. Issues that are likely to receive particular attention going forward are the extent and quality of evidence that parties must produce in order to oblige the Commission to conduct a more detailed analysis, and the depth of analysis required from the Commission.

These issues may well be tested in the context of the Commission's ongoing investigation of Google in relation to its AdSense platform and Android operating system. Both cases feature concerns that Google has entered into exclusivity agreements (respectively with web-site owners and handset manufacturers).

Links:

[CJEU Judgment](#)

[General Court Judgment](#)

[Commission Decision \(press release\)](#)

[Google Investigations \(press releases\)](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com