October 29, 2024

Intel Wins Landmark Case as ECJ Clarifies the Legal Analysis of Rebate Schemes

With its judgment of 24 October 2024 (C-240/22 P), the Court of Justice of the European Union ("ECJ") has upheld the annulment of a 2009 European Commission ("Commission") decision that fined Intel EUR 1.06 bn for abusing its dominant position in the worldwide CPU market. The ruling is pivotal for the Commission's burden of proof under Art. 102 TFEU, the use of the as-efficient-competitor test and provides a revised enforcement framework for rebate schemes.

Background

The ECJ's judgment confirms the findings of a General Court ruling in 2022, which overturned the 2009 Commission decision and rejected the Commission's subsequent appeal. In that decision, the Commission found that Intel's rebates to a number of Original Equipment Manufacturers ("OEMs") constituted loyalty rebates that induced exclusivity and foreclosed competition – in particular from x-86 licensee, AMD. The Commission conducted a so-called as-efficient-competitor ("AEC") test to determine whether an equally efficient competitor could compete notwithstanding these rebates, concluding – despite a body of contrary evidence submitted by Intel – that Intel's practices were capable of producing exclusionary effects. Under Art. 102 TFEU the Commission imposed a (then-record) fine of EUR 1.06 bn on Intel.

The decision has been appealed and referred back on a number of occasions over the past 15 years, culminating in the ECJ's ruling of 24 October 2024 – which has been long awaited and is the most recent of a series of landmark judgments on the enforcement and application of Art. 102 in the past few months.

Judgment

Competition on the merits and exclusionary effects. The ECJ confirms that Art. 102 TFEU does not aim to prevent a company from achieving a dominant position through legitimate competitive practices. The ECJ explicitly holds that not every exclusionary effect is harmful to competition; rather, competition on the merits may naturally result in the exit or marginalization of less efficient competitors. However, the judgment reiterates – in line with long-standing case law and also the Commission's recent draft guidelines on exclusionary abuses under Art. 102 – that exclusionary effects are problematic when they result from conduct by dominant undertakings that falls outside of "*competition on the merits*".

The finding of an abuse and the Commission's burden of proof. The ECJ emphasizes that it falls to the Commission to prove infringements under Art. 102 TFEU to the requisite legal standard. This obliges the Commission to undertake an analysis of all

© 2024 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

relevant factual circumstances, such as the extent of a company's dominant position, the share of the market affected by the allegedly abusive conduct, and (specifically with regards to rebate abuses) the conditions and arrangements for granting the contested rebates, their duration, and their amount. Additionally, the Commission must assess the possible existence of a strategy geared at excluding competitors "*that are at least as efficient*" as the dominant undertaking.

Relevance of the AEC test. To discharge the Commission's burden of proof, the ECJ accepts that the AEC test is "*as a general rule*" the relevant analytical framework to assess whether the application of loyalty rebates falls inside or outside the notion of competition on the merits. While the ECJ accepts that the AEC test is "*merely one of the ways*" of assessing whether a given conduct falls within or outside the notion of "competition on the merits", it imposes on the Commission a duty of care of when it does deploy the AEC test.

The role of countervailing evidence. Specifically, the ECJ requires from the Commission that, where a dominant undertaking submits supporting evidence showing that the conduct in question was not capable of producing the alleged foreclosure effects, the Commission is required to engage with that evidence and prove to the requisite legal standard (including by assessing the existence of an exclusion strategy) that an as-efficient competitor could not compete with the dominant company. Throughout the judgment, the ECJ carefully assesses and subjects the Commission's findings as well as the General Court's review of those findings to a critical analysis. The ECJ concludes that the General Court did not err in annulling the Commission's decisions for the Commission's failure to convincingly rebut Intel's countervailing evidence, as submitted throughout the administrative procedure.

Implications

The judgment comes at a turning point in the Commission's enforcement policy under Art. 102, offering valuable insights for the Commission's ongoing review of a new set of guidelines on exclusionary abuses under Art. 102 (the "Art. 102 Draft Guidelines"). These Art. 102 Draft Guidelines introduce rebuttable enforcement presumptions that can reverse the burden of proof for certain categories of conduct that meet legal tests established by the ECJ (refer to our client update here).

While the ruling upholds the Commission's interpretation of several key principles in the Art. 102 Draft Guidelines, it also likely necessitates amendments to the current draft. These amendments will influence the Commission's future enforcement policy under Art. 102 and are of importance for dominant companies:

- **General assessment framework for rebate schemes**. The ruling provides a revised enforcement blueprint for the assessment of rebate schemes, requiring the Commission to investigate the circumstances surrounding the rebate scheme, its duration, market coverage, and also (importantly) whether the dominant company pursued an exclusion strategy. Dominant companies are advised to engage with these factors using compelling countervailing (quantitative or qualitative) evidence to disprove alleged rebate abuses.

- **Loyalty rebates**. In contrast to the Art. 102 Draft Guidelines, the Court does not draw a sharp dividing line between exclusivity, loyalty or other conditional rebates but subjects them to the same assessment framework. This will likely impact the applicable enforcement presumptions, allowing dominant companies to more effectively disprove purported anti-competitive effects of loyalty rebates in particular.

- **Enforcement presumptions and importance of economic evidence**. The ruling places an obligation on competition agencies to constructively engage with economic evidence submitted by dominant companies. The ruling also shows (similarly to the ruling under appeal from the General Court) that the European Courts are ready to subject Commission decisions under Art. 102 to close scrutiny of econometric evidence. While it remains to be seen whether the Art. 102 Draft Guidelines adapt the scope of applicable enforcement presumptions or the burden to reverse these presumptions, dominant companies are likely better placed as a result of the judgment to be heard on their economic-effects analysis.

In reaction to the judgment, a Commission spokesperson confirmed that the Commission has taken note and will carefully assess the ruling. Whether or not this latest episode of the Intel saga appreciably affects the Art. 102 Draft Guidelines will likely be seen in the coming months and before the end of 2025, when the Commission intends to adopt the final text of the guidelines.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Ross Ferguson
+44-20-7601-8646
rferguson@paulweiss.com

Annie Herdman
+44-20-7601-8602
aherdman@paulweiss.com

Nicole Kar
+44-20-7601-8657
nkar@paulweiss.com

Henrik Morch
+32-2-884-0802
hmorch@paulweiss.com

Rich Pepper
+44-20-7601-8660
rpepper@paulweiss.com

Associates Fynn Hendrik Dewald and Vasiliki Dolka contributed to this Client Memorandum.