The Public Competition Enforcement Review

Tenth Edition

Editor
Aidan Synnott

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Tenth Edition

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. We also see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. Particularly notable this year are the chapters from the United Kingdom and Argentina: the authorities in the United Kingdom are surely busy adapting for a post-Brexit enforcement regime, while those in Argentina are 'pushing for the issuance of a new antitrust law ... with several major changes'. Indeed, in the report that follows, we read of many areas where the new Argentine administration has stepped up enforcement activities. South Africa is also proposing 'substantial changes' to its competition law.

Cartel enforcement remains robust. In the pages that follow, we read of numerous matters before Brazilian enforcers; a notable new emphasis on cartel enforcement in Argentina; and in Australia, the imposition of a fine in 'the first criminal prosecution for cartel conduct'. We also read of the continued use of leniency programmes in several jurisdictions. However, the chapter on the European Union reports that leniency applications have appreciably declined, which, the authors note, 'raises the question of the effectiveness of the leniency programme itself and of other detection methods'. Still, the report from France details the first use of that country's leniency programme in conjunction with a new settlement procedure. The authors note that 'the recent new settlement procedure may accelerate proceedings as more companies may be willing to settle'. The report from Argentina describes a proposed leniency programme there.

The above-referenced French case involved an alleged cartel of manufacturers of PVC and linoleum floor coverings. (The Chinese also fined manufacturers of PVC.) In Australia, the authorities moved against an alleged cartel of suppliers of roof sheeting. Fines were imposed upon cement companies in Italy and Australia. The EU and United Kingdom chapters discuss the use of pricing algorithms by cartels. Both the United Kingdom and the United States brought actions concerning alleged cartels relating to the sale of real estate: the United States continued its enforcement activities against real estate auction bid-rigging, and the UK brought an action against agents alleged to have engaged in a cartel related to their services.

In the areas of restrictive agreements and abuse of dominance, several jurisdictions continued to police firms in the pharmaceutical industry. The chapters from China, France and the United Kingdom describe several of these enforcement efforts. Moreover, the French authorities launched a broader inquiry into several areas in the healthcare sector. Additionally, in France a gas supplier was fined for abuse of its dominant position. In the United Kingdom, the Competition and Markets Authority continued its work against resale price maintenance,

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a practice that was also met with scrutiny by authorities in India. In addition, there are pending appeals in cases involving payment cards in both the United States and the United Kingdom, and a resolution of a payment card case in Argentina. More generally, the report from Argentina notes 'heightened activity in conduct investigations', and the chapter from Australia details two amendments to that country's Competition and Consumer Act relating to misuse of market power and 'concerted practices'. The discussion on loyalty rebates and exclusivity in the EU Overview will be of interest to many.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors ranging from banking in Brazil to online property advertising platforms in France. French authorities also revisited conditions placed on earlier pay-television and free-television mergers in light of changing competitive conditions. Indeed, our French contributors note an increasing amount of merger activity there; and from Argentina, we read that 'significant steps have been taken towards a more proactive merger control system', along with an acceleration of the pace at which the Antitrust Commission reviews cases. In Brazil, '[t]here has been an increase in the number of mergers reviewed by' the authority there, 'as well as in the number of transactions subjected to substantial scrutiny and opposition, and even effectively blocked by the authority'. The *AT&T/Time Warner* deal is being challenged in the United States, but was cleared – with certain conditions – in Brazil, where 'AT&T owns [a] pay-tv services operator ... and TimeWarner licenses channels to pay-tv operators'. The report from China notes several enforcement actions arising out of merger process violations, such as the failure to properly report transactions, along with conditional approvals of acquisitions involving printing and container transport.

Last, but certainly not least, readers will be quite interested in the informative discussion of '[t]he biggest talking point for UK competition law' – Brexit – in the chapter from the United Kingdom. Here, the authors discuss the potential consequences of Brexit on the UK's competition enforcement regime, while noting that the 'future ... remains unclear'. We will watch with interest to see how evolving proposals for Brexit may affect competition enforcement in the United Kingdom and the European Union.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2018

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Chapter 1

EU OVERVIEW

Frédéric Louis and Anne Vallery[1]

I THE YEAR IN REVIEW – A BUSY YEAR WITH A SPECIAL EMPHASIS ON ABUSE OF DOMINANCE DEVELOPMENTS

As usual, it would be impossible to cover all the significant developments, touching upon all aspects of European Commission (EC) enforcement of the TFEU antitrust rules, under the supervision of the EU courts in Luxembourg, that took place over the past year. Instead, we have chosen to briefly highlight a few,[2] while discussing in greater detail below two important cases relating to Article 102 TFEU enforcement: the *Google Shopping* decision, which led to the imposition of a mega fine, and the *Intel* judgment of the Court of Justice (ECJ), the latest episode in the unfolding saga that saw the EC impose in 2009 what was then the largest single fine ever on a company for a competition violation, a title that has now been passed on to Google.

i Guidance on hybrid cartel proceedings

In 2017, the courts provided relevant guidance on hybrid cartel proceedings, that is, proceedings that are concluded with a settlement covering some defendants and the normal adversarial procedure for others.

In *Timab*, the ECJ assessed legitimate expectations and the right of a non-settling party not to self-incriminate. Timab decided to withdraw from the settlement discussions in the *Phosphates* cartel. In the Commission decision fining Timab, the relevant period for Timab was 15 years shorter than initially considered for the purposes of the settlement proceedings, but its fine was larger than discussed during settlement. The ECJ confirmed that the Commission was not bound by the range of fines indicated during the settlement procedure, so Timab's legitimate expectations were not infringed. In addition, the Commission did not breach Timab's right not to self-incriminate when it used statements made in Timab's leniency application and discussed during the settlement. According to the Court, such statements

1 Frédéric Louis is a partner and Anne Vallery is a special counsel at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale) in Brussels. The present contribution would not have been possible without the invaluable discussion of developments in John Ratliff's yearly review of 'Major Events and Policy Issues in EU Competition Law' 2016–2017, to be published in the *International Company and Commercial Law Review*. With thanks to Alvaro Mateo Alonso for his assistance.

2 Any selection entails making choices. Among cases not further reported here, we would highlight the imposition of the highest ever cartel fine (€880 million) on truck maker Scania on 27 September 2017, thus concluding the EC's investigation of the Truck cartel, which had already seen the imposition of record fines on the defendants who agreed to settle the case in 2016.

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were voluntarily provided by Timab in its leniency application and did not arise from the settlement discussions. Thus, the Commission could take them into account when setting the amount of the fine.[3]

In *ICAP*, the General Court (GC) addressed the issue of the presumption of innocence in staggered hybrid decisions, whereby non-settling parties' decisions are adopted after settlement decisions. The GC held that the Commission had breached the presumption of innocence of ICAP, the only party to the *YIRD* cartel not to settle. According to the GC, the facts set out in the settlement decision revealed very clearly the Commission's position on the participation of ICAP in the infringement.

Surprisingly, the GC considered that such breach should not lead to the annulment of the decision, because the Commission had demonstrated the infringement to the requisite legal standard, so that the outcome would not have been different without the breach. It remains to be seen whether the ECJ follows such approach or considers it to be contradictory.[4]

It should be noted that DG COMP's current position towards hybrid settlements appears to be that no settlement will be offered to interested defendants when it is clear from the start that one or more defendants will not consider a settlement.

ii Insufficient motivation of the fining calculation

Again in *ICAP*, the GC annulled the fine for insufficient reasoning. ICAP, a facilitator of the *Yen Interest Rate Derivatives* cartel, was not active on the YIRD market. As a result, the Commission departed from its traditional fining methodology by virtue of paragraph 37 of its Fining Guidelines.[5] The GC considered that such departure was justified, but annulled the fine for insufficient motivation of the alternative calculation.[6]

iii Purchasing cartel and fining methodology

In *Car battery recycling*, the parties colluded to reduce their purchase price, which is a rare type of cartel. The Commission took into consideration this particular nature when setting the fine: it used the value of purchases instead of the value of sales, and increased the fine by 10 per cent because these values were deemed particularly low.[7]

iv Reasonable time for judicial adjudication

For the first time, the GC awarded damages for a breach of the fundamental right to adjudication within a reasonable time. The GC provided guidance on what is a 'reasonable' delay: a 15-month review period between closure of written pleadings and opening of the oral procedure. Such period may be extended having regard to the circumstances (additional applicants, complexity of a case, long pleadings of the parties). The GC awarded compensation

3 C-411/15 P, *Timab Industries and CFPR v. Commission*, judgment of 12 January 2017. Note that Timab's position in damages litigation may very well benefit from the drastic reduction in the duration of the infringement imputed to it, despite the higher administrative fine.

4 Case T-180/15 *ICAP*, judgment of 10 November 2017.

5 EC Fining Guidelines, see OJ C210/2, 1 September 2006.

6 Case T-180/15, *ICAP and Others v. Commission*, judgment of 10 November 2017.

7 Case AT.40018, decision of 8 February 2017.

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for bank guarantee costs supported for the period exceeding the reasonable delay (material damage), but not for default or late payment interest. Little was awarded for non-material damages.[8]

v Decline of leniency and anonymous whistleblower tool

It has been reported that leniency applications declined by 50 per cent between 2014 and 2016.[9] This decline raises the question of the effectiveness of the leniency programme itself and of other detection methods. The decline of the leniency programme appears to be behind the Commission's decision to launch an anonymous whistle-blower tool. This allows individuals to report antitrust infringements while maintaining their anonymity.[10] According to Commission officials, the website gets more than 9,000 hits per month, but it remains to be seen whether any of these will be actionable.[11]

vi Final Report on the sector inquiry into e-commerce of consumer goods and digital content

In May 2017, the Commission published its Final Report on the e-commerce sector inquiry,[12] which integrates earlier reports[13] and is accompanied by an extensive Staff Working Document (some 300 pages).[14] The Final Report strikes more of a balance than previous iterations and illustrates the limitations inherent in conducting a market integration policy via competition enforcement.

The Final Report acknowledges the complex and controversial balances in play between:

a the aspirational EU single market and *de facto* regional and national markets;
b brick and mortar shopping and online shopping;
c pricing competition and other parameters of competition; and
d competition law and IP law.

8 Cases T-577/14, *Gascogne Sack Deutschland GmbH and Gascogne v. European Union*, judgment of 10 January 2017; T-479/14, *Kendrion NV v. European Union*, judgment of 1 February 2017; T-725/14, *Aalberts Industries NV v. European Union*, judgment of 1 February 2017; T-40/15, *Plásticos Españoles, SA (ASPLA) and Armando Álvarez, SA v. European Union*, judgment of 17 February 2017; and T-673/15, *Guardian Europe Sàrl v. European Union*, judgment of 7 June 2017. All these judgments have been appealed to the ECJ.

9 In 2014 there were 46 leniency applications, which dropped to 24 in 2016. General Competition Review, Rating Enforcement 2017, Rating Enforcement 2016, available at http://globalcompetitionreview.com/series/rating-enforcement, and General Competition Review, Rating Enforcement 2015, available at http://81.7.114.195/uploads/documents/files/administracine_informacija/naudos_vertinimas/nauda_gcr_2014.pdf.

10 European Commission, Antitrust: Commission introduces new anonymous whistleblower tool, press release IP/17/591 of 16 March 2017. Available at http://europa.eu/rapid/press-release_IP-17-591_en.htm.

11 PaRR, 'EC whistleblower page gets 9,000 monthly hits – Laitenberger', 24 October 2017. Available at https://app.parr-global.com/intelligence/view/prime-2524358?src_alert_id=9814.

12 http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. The commerce enquiry was launched on 6 May 2015 as part of the Commission's Digital Single Market strategy.

13 Geo-blocking paper: http://ec.europa.eu/competition/antitrust/ecommerce_swd_en.pdf. Preliminary report: http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf.

14 http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

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It recognises the different levels of online uptake in EU Member States, and does not call for a review of the Vertical Restraints Block Exemption Regulation.[15]

As regards consumer goods, the Final Report recognised the difficulties in addressing geo-blocking and geo-filtering practices through competition enforcement, which led the Commission to propose outlawing certain practices.[16] The Commission noted that online marketplace bans were not hardcore restrictions. The report acknowledges the complex balance between brick and mortar shopping and online shopping, and the issue of free riding. The Commission emphasised that online transparency and automatic pricing software may facilitate resale price maintenance and price collusion. Last, the Report noted the increasing importance of data and the risks linked to the exchange of sensitive data between suppliers, distributors and online marketplaces (potential competition).[17]

As regards digital content, the Commission's initial push on this area was gradually moderated. The Final Report outlined some concerns but did not establish whether certain practices infringe EU competition law or not. This is because competition enforcement is inherently harder given the traditional division of copyright law along national lines. This helps explain why the Commission contemplated regulatory intervention.[18]

The findings of the Final Report should be seen against the Commission's wide enforcement action that is currently under way. On geo-blocking, the Commission opened investigations regarding agreements between major PC video game publishers and Valve;[19] Guess' distribution agreements;[20] and Nike, Sanrio and Universal Studios' licence agreements for rights for merchandising products.[21] On geo-filtering, there is a pending investigation of Mélia Hotels' agreements with tour operators Kuoni, REWE, Thomas Cook and TUI.[22] On resale price maintenance, Asus, Denon & Marantz, Philips and Pioneer are under investigation.[23] National competition authorities are also conducting investigations in this field.[24] More cases may be expected.

15 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, pp. 1–7.

16 Adopted as Regulation (EU) 2018/302 of the European Parliament and of the Council on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60, 2.3.2018, pp. 1–15.

17 Other issues were considered as low priority for the Commission (price comparison tool restrictions, most favoured nation clauses and restrictions on the use of brand names for online advertisement). The Commission did not address these issues in the Final Report communicated to the European Parliament and to the EU Council, but only in the Staff Working Document.

18 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market. OJ L 168, 30.6.2017, pp. 1–11.

19 Press release IP 17/201, 2 February 2017.

20 Press release IP 17/1549, 6 June 2017.

21 Press release IP 17/1646, 14 June 2017.

22 Press release IP 17/201, 2 February 2017.

23 Press release IP 17/201, 2 February 2017.

24 For instance, in August 2016 the UK sanctioned Trod for agreeing with GB Eye to not undercut each other's prices on Amazon UK's website. This cartel was implemented using automated repricing software. Competition and Markets Authority, Online sales posters and frames. Available at https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products.

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vii Marketplace bans and luxury goods

In December 2017, the ECJ followed AG Wahl's opinion in *Coty* and ruled that luxury goods suppliers may prevent retailers from using online marketplaces to preserve a product's luxury image, and that such restrictions are not hardcore restrictions.[25] Interestingly, the Court relied on the e-commerce sector inquiry to establish its findings. In an important clarification, the Court noted that luxury goods may require a selective distribution system to preserve their quality and to ensure that they are used properly, thus clarifying that the earlier *Pierre Fabre* ruling specifically referred to online sales bans.[26] However, it is still controversial whether a non-luxury goods supplier can use marketplace restrictions. The German Competition Authority reacted to the judgment by insisting that non-luxury good suppliers 'have not received *carte blanche* to impose' bans on selling via marketplaces.[27]

viii Algorithms and competition

Apart from the increased transparency that online markets bring, one topical issue this year is algorithms. There is much debate about competitors configuring their pricing algorithms the same way, or using a common algorithm, or exchanging information on their algorithms or programming them to agree on prices. The key issue is whether these are agreements or concerted practices, infringements by object or effect, or unilateral conduct.[28] It is too early to say whether the mainly theoretical concerns expressed thus far will lead to much concrete enforcement.

ix Major ongoing abuse of dominance investigations

Apart from the sanction on Google in the *Shopping* case (described below), the Commission continued its long-standing investigations into Google Android, Google AdSense, Qualcomm[29] and Gazprom. In March 2017, the latter proposed commitments.[30]

x Excessive pricing

Excessive pricing is an area where the Commission has been traditionally reluctant to launch cases as it does not see itself as a price regulator. However, in May 2017, the Commission opened an investigation into Aspen Pharmacare's pricing of five cancer drugs, and alleged threats to withdraw or actual withdrawal of the medicines to force through price increases. This follows an Italian case in which Aspen's conduct was already subject to a fine. This is the first Commission case on excessive pricing in the pharmaceutical sector.

25 Case C-230/16, *Coty Germany v. Parfümerie Akzente*, judgment in preliminary ruling of 6 December 2017.

26 Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, judgment of 13 October 2011.

27 'Our preliminary view is that such manufacturers have not received carte blanche to impose blanket bans on selling via platforms.' PaRR, 'ECJ Coty ruling to trigger questions over meaning of luxury', 6 December 2017. Available at https://app.parr-global.com/intelligence/view/prime-2550267?src_alert_id=189699.

28 OECD report 'Algorithms and collusion', available on the OECD website at http://www.oecd.org/competition/algorithms-and-collusion.htm, to which there is an EC contribution, available at https://one.oecd.org/document/DAF/COMP/WD(2017)12.

29 The *Qualcomm* investigation culminated in a €997 million fine imposed on 24 January 2018.

30 Press release IP 17/555, 13 March 2017. The case is AT.39816.

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Furthermore, in September 2017, the ECJ provided indications on how to assess whether a price is excessive. The Court upheld an assessment based on the comparison of price levels with other Member States, noting that there are no minimum thresholds above which a price may be seen as excessive. But prices significantly and persistently higher than found in other Member States are indicative of an abuse. The Court did not follow AG Wahl's opinion that excessive prices 'can only exist in regulated markets'.[31]

xi Recognition of the role of the Hearing Officer

In *Evonik Degussa*, the ECJ strengthened the role of the Commission's Hearing Officer (HO). The judgment decided that the HO must review all confidentiality claims raised in objection to disclosure of information intended by the Commission, based on any rule or principle of EU law (in the case at hand, the HO had refused to examine claims based on legitimate expectations and equal treatment).[32]

xii Double jeopardy

In *Gasorba*, the ECJ ruled that an EC commitment decision does not prevent national courts from examining under EU competition law practices covered by an EC decision. This is because commitments do not establish an infringement. However, national courts are expected to take EC commitment decisions as an indication, or even as *prima facie* evidence, of the anticompetitive nature of the conduct.[33]

II GOOGLE SHOPPING

In June 2017, the EC closed its long-running investigation into alleged favouritism by Google of its own Google Shopping services in Google Search results with a record-breaking fine of €2.42 billion.[34] The proceedings had been initiated in late 2010 following several complaints from EU and US competitors, and had once looked like they would be resolved through voluntary commitments, which were market-tested in April 2013.[35] However, the magnitude of the pushback, including in political circles in influential Member States, led the EC to abandon this route in favour of a punitive approach.

The EC decided that Google had abused its dominant position in each of 13 national markets for general search services by positioning and displaying more favourably, in its general search results pages, its own comparison service compared to competing comparison shopping services. The decision found that this behaviour was capable of foreclosing competing comparison shopping services, reducing their incentives to innovate, and ultimately of reducing the ability to access the most relevant comparison shopping services and possibly to have to pay higher prices for products advertised through Google Shopping.

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31 Press release IP 17/1323, 15 May 2017. The case is AT.40384.

32 Case C-162/15 P, *Evonik Degussa v. Commission*, judgment of 14 March 2017.

33 Case C-547/16, *Gasorba ao v Repsol*, judgment in preliminary ruling of 23 November 2017.

34 Case AT.39740, decision of 27 June 2017, *Google Search (Shopping)*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf. Google's parent, Alphabet, was fined €523 million jointly and severally with its subsidiary, covering the period since October 2015.

35 Google proposed three successive sets of commitments, the last of which was submitted in January 2014.

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i Relevant markets

The EC delineated national markets for (paid) comparison shopping services[36] as the markets where the alleged anticompetitive effects of Google's conduct were felt. The EC decided that online marketplaces are not part of this service market, because comparison shopping services act as intermediaries between users and sellers, including marketplaces, so that users can compare offers from competing marketplaces, do not offer users the possibility to purchase a product directly on their website and do not offer after-sales support. The decision also identified different purposes served by comparison shopping services and online marketplaces. There does not appear, however, to have been a detailed effort to identify demand patterns, for instance whether there was one-way substitution (and a resulting competitive constraint) to the benefit of online marketplaces away from comparison services.[37]

ii Dominant position

The EC found that Google was dominant on all EEA national markets for (free) general search services, essentially based on Google's very high market shares and the amounts and time it invests in continuous product innovation, which it felt new entrants were not able to match. It discussed network effects generated by the minimum number of queries a search engine must generate to be viable, and noted that most users trust Google search results and do not conduct multi-homing searches. The market for general search services was distinguished from markets for specialised search services, content sites and social networking sites.

iii Conduct

The abusive conduct consists in Google Shopping results appearing in a box on top or at the right-hand side of the first page of the general search results, in rich format with pictures and additional information on products and prices, while competing services appear as generic search results and are often demoted through use of Google's ranking algorithms. According to the EC, this matters because user traffic analyses show that the highest-ranking results are the ones most users will click on. This conduct allegedly led to significant traffic gains for Google Shopping, at the expense of competing services.

iv Uncertainty as to applicable theory of harm

It should be noted that the EC decision does not clearly outline what its theory of harm is, although later informal explanations have suggested that the decision is based on leveraging. Others put forward that the applicable theory is in fact that of essential facilities, and that the decision fails to demonstrate to that strict legal standard why third parties should benefit from the same position on the Google Search results page as the Google Shopping results.

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36 These services are remunerated on a pay-per-click basis, whereby the online retailer pays a fee for each visitor sent to its website.

37 For instance, the decision notes that comparison shopping services tend to list offers from larger retailers that want to retain a direct link with shoppers, while online marketplaces tend to list offers from small and medium-sized retailers unable or unwilling to maintain their own online stores. No account is taken of the rising phenomenon of branded webshop pages on Amazon.

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v Efficiencies given little consideration

Google argued that its conduct was objectively justified and generated efficiencies: the use of its algorithms is necessary to preserve the usefulness of its generic search results; the separate positioning and display of the Google Shopping results improves the quality of Google's services to users and advertisers; and displaying competing comparison shopping services in the same way as the Google Shopping results would disrupt competition between rival services, which compete by showing their own results, and would prevent Google from monetising space on its general search results pages. The EC rejected these arguments, holding that Google should be able to treat competing services equally while preserving quality and the ability to monetise its results space. It similarly rejected arguments based on Google's fundamental property and freedom to impart information rights as well as its fundamental right to conduct its chosen business.

vi Uncertainty as to acceptable remedy

The decision orders Google to put an end to the conduct but does not offer much guidance on the remedy, in contrast with past cases in the tech industry and notably the *Microsoft* saga, where the first remedy imposed by the Commission had proven to be ineffectual, with later remedies being better designed.[38] To comply with the decision, Google set up Google Shopping as a separate business and organised an auction-based system where Google Shopping competes with other comparison services for display in the Shopping Units box. Empirical evidence since the rollout of the remedy suggests Google Shopping results represent the majority of results displayed, if not all the results, in most cases.[39] The EC is currently reviewing the remedy's compliance with its decision.

On 11 September 2017, Google and Alphabet appealed the decision to the GC.[40]

III LOYALTY REBATES AND EXCLUSIVITY: NOTHING NEW UNDER THE SUN AFTER INTEL?

In September 2017,[41] the ECJ rendered its eagerly awaited judgment in the *Intel* case. Following the Commission's investigation, which started in 2009, Intel had asked the ECJ to set aside the GC judgment of 12 June 2014 dismissing its action for annulment of the EC decision imposing a fine of €1.06 billion for an alleged abuse of a dominant position in the form of conditional rebates and naked exclusionary conduct.

38 The decision outlines a few general principles that Google must respect in setting up the remedy but does not prescribe any concrete implementation of these principles. This silence on what would constitute an acceptable remedy may be indicative of the dilemma the EC is faced with, as entertaining the arguments of complainants determined to see the separate display of rich format paid results disappear (see https://searchengineland.com/googles-antitrust-infringement-continues-unabated-google-shopping-competitors-tell-european-commission-293273) may run against the interests of advertisers and consumers in what Google argues is a clear product improvement.

39 This may be a product of Google Shopping systematically presenting high bids. Conversely, and given Google's rivals' stated opposition to the auction remedy, it may be the product of these rivals 'sabotaging' the system by not bidding or systematically presenting low bids in an attempt to brand the remedy as ineffective.

40 The case is T-612/17.

41 Case C-413/14 *P, Intel Corporation Inc. v. Commission*, judgment of 6 September 2017.

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i 'By object' infringement or 'by effects' analysis

In its judgment, in addition to two key procedural questions, the ECJ had the opportunity to revisit the law on exclusive dealing and loyalty rebates, which, although highly controversial, was considered settled by previous case law going back to the seminal *Hoffmann-La Roche* ruling.[42] However, a closer look showed growing uneasiness with the traditional approach,[43] while the adoption by the Commission of its guidance paper[44] led many to hope for a more effects-based or economic approach. In this regard, *Post-Danmark I*[45] represented a step in the right direction.

Intel challenged the GC's refusal to consider economic arguments before concluding that the Commission was right in finding that Intel's pricing practices amounted to an abuse of a dominant position. Intel basically submitted that there was no basis to support the assumption that loyalty rebates must be treated as inherently anticompetitive and that the assessment of whether loyalty rebates were capable of restricting competition requires an examination of all the relevant circumstances (level of rebates, duration, market shares concerned, capability to foreclose an efficient competitor, etc.).

Taking into account the necessary compromises inherent in a system that does not allow for dissenting or concurring opinions, the Court's judgment has been carefully drafted and is a model of the genre.

Foremost, the Court – in a clear reference to its earlier *Post-Danmark I* ruling – recalled that not every exclusionary effect is necessarily detrimental to competition, and that Article 102 TFEU is not opposed to less efficient competitors leaving the market or being marginalised. Article 102 TFEU does, however, protect as efficient competitors (AECs) as the dominant undertaking from the latter's exclusionary (pricing) practices.

Next, the Court also clearly reaffirmed its prevailing case law that exclusive dealing or loyalty rebates on the part of an undertaking in a dominant position constitute an abuse within the meaning of Article 102 TFEU.

The ECJ nonetheless immediately nuanced this statement under the guise of a further clarification of its existing case law. When the undertaking in a dominant position 'submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition',[46] the Commission is required to concretely assess the intrinsic capacity to foreclose AECs on the basis of all the relevant circumstances (the extent of the dominant position, the market share concerned by the practices, conditions, duration, amount of the rebates, etc.).

Finally, the Court concluded that similarly, the GC must examine all arguments invoked by the undertaking in a dominant position to contest the Commission's analysis of the intrinsic capacity of the challenged practices to restrict competition. In its *Intel* decision, the EC did perform an analysis of all circumstances of the case, including the AEC

42 Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, EU:C:1979:36 ; see also case C-95/04 *P, British Airways plc v. Commission*, EU:C:2007:166 ; case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission*, EU:T:2003:250.

43 See, e.g., Case C-549/10 P, *Tomra Systems ASA and others v. Commission*, EU:C:2012:221; see also case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, EU:C:2015:651.

44 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

45 Case-209/10, *Post Danmark v. Commission, EU*:C:2012:172.

46 Case C-413/14 *P*, paragraph 138.

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test. Despite the Commission stating that the pricing practices were capable of restricting competition by their very nature, the ECJ considered that the AEC analysis conducted by the EC was key to the latter's assessment. Therefore, the GC should not have refused to examine Intel's criticisms of the EC's analysis.

The key takeaways from this judgment are the following.

First, Article 102 TFEU does not apply to exclusionary practices that foreclose less efficient or inefficient competitors.

Second, Article 102 TFEU prohibits exclusionary practices, on the part of a dominant undertaking, which are capable of restricting competition and foreclosing AECs, exclusive dealing and loyalty rebates being good examples.

Third, when the dominant undertaking, on the basis of supporting evidence, argues that the alleged abusive practices are not capable of restricting competition, the Commission, and the GC in appeal of the decision, must assess all circumstances surrounding the practices, including the plausible foreclosure effects on an AEC on the basis of the AEC test.

However, while the judgment evidently places a new emphasis on economic evidence and analysis, its exact meaning and its practical consequences remain debatable.

On the difference between 'by object' and 'by effects' abuses, most concur that the ECJ has confirmed that exclusive dealing and loyalty rebates are practices that are by object, by their very nature, capable of restricting competition, which means that they would be presumed to foreclose AECs. Theoretically, the Commission could discharge its burden of proof as to the existence of an abuse merely by establishing the existence and implementation of the practices. This would constitute a rebuttable presumption of violation of Article 102 TFEU. The burden of proof would then be on the dominant undertaking to establish, on the basis of supporting evidence, that the challenged practices are in fact not capable of restricting competition in view of all circumstances of the case. It is then up to the Commission again to examine and analyse the effects of the challenged practices in light of the evidence presented by the defendant. The Commission will thus have to establish that the pricing practices are capable of having anticompetitive effects on the basis of an analysis of the relevant market, the structure of the market, the position of the dominant undertaking, and the nature and functioning of the practices.

This interpretation of the judgment calls for the following comments.

While the existence of a rebuttable presumption that exclusivity and loyalty rebates are capable of foreclosing AECs can be said to be in line with the careful wording of the ECJ's ruling, the fact remains that the ECJ never used these loaded terms, which are quite familiar to the Court. In fact, the terms of the judgment arguably equally support the contrary view that the Court held that since Article 102 TFEU does not seek, as a rule, to protect less efficient competitors, exclusivity and loyalty rebates can only be held abusive once they are shown to be capable of excluding AECs, which requires an economic analysis, unless the defendant concedes that point.

The resulting uncertainty has consequences for the allocation of the burden of proof. If there is a rebuttable presumption of abuse, then the dominant undertaking will need to rebut this presumption to force the EC into conducting a full economic analysis. This begs the question of how far the dominant undertaking must go to rebut the presumption: that is, would it have to establish that the practices are incapable of restricting competition before the burden of proof returns to the Commission? Would the defendant be required to develop a complete effects analysis, including a detailed analysis of the AEC test, which the Commission would then have to challenge? Or does the defendant have to meet a lower

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threshold and, if so, what sort of evidence must it put forward? If, however, there is no rebuttable presumption, then the burden of proof of the existence of an abuse of dominance rests entirely with the Commission and the Commission must conduct an economic analysis as soon as the defendant challenges that its practices are capable of foreclosing AECs.

Whatever the answer may be, it would seem procedurally unsound for the Commission not to conduct its own effects analysis from the start. Relying on a mere rebuttable presumption in its statement of objections, the scope of which would be limited to establishing the existence and implementation of the contentious practices, would run the risk of having to issue a supplementary statement of objections to discuss the alleged anticompetitive effects of the practices in virtually every such case, as the dominant undertaking would have every incentive to raise the lack of capability to restrict competition in response to the first statement of objections. In practice, therefore, the Commission will likely as a matter of course analyse the foreclosure capacity of the practices in the first statement of objections rather than relying on a mere rebuttable presumption.

Another unclear issue in the judgment is the exact status of the AEC test. The ECJ is normally and understandably reluctant to prescribe to the Commission the use of a particular economic test to conclude on the capability to restrict competition or on the existence of anticompetitive effects.[47] Nevertheless, in view of the ECJ's insistence on the AEC benchmark, it appears that a detailed analysis of the AEC test will have to be undertaken by the EC as part of its economic analysis. At the very least, if it does not want to apply this test in a concrete case, the EC would need to substantiate the reasons why the AEC test would not be appropriate for the assessment of the foreclosure capability of the practices under investigation.

ii Necessity to conduct an economic analysis to consider potential objective justifications or efficiencies generated by the practices under investigation

Whatever the status of the economic analysis for the preliminary finding of abuse, the ECJ in *Intel* has further made it clear that this analysis would in any event be required to assess objective justifications or potential efficiencies generated by the practices, as advanced by the defendant to escape a finding of abuse. The assessment of such justifications or efficiencies indeed requires balancing the anticompetitive and pro-competitive effects of the practice, which can only be done if the anticompetitive effects have been properly identified.

iii Jurisdictional test: qualified effects test or implementation test

In its judgment, the ECJ confirmed the GC's acceptance of the qualified effects test as a basis for the Commission's jurisdiction over certain practices that took place entirely outside the EU's territory. The Court indeed affirmed that the qualified effects test pursues the objective of preventing conduct that, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market, that is, within the territorial scope of Article 101 and 102 TFEU. The ECJ also dismissed Intel's argument that certain specific practices could

47 Although there is a precedent for this: the *Akzo* case, where the ECJ set out the test to determine when below-cost pricing can be deemed predatory and therefore contrary to Article 102 TFEU, case C-62/86, *AKZO Chemie BV v. Commission*, judgment of 3 July 1991. This ruling did not, however, prevent the EC from presenting an amended version of the test for predation in its guidance.

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not have foreseeable, immediate and substantial effects in the EEA, in view of the limited number of products affected, as the conduct must be seen as a whole and the probable effects on competition must be taken into account.

iv Procedural treatment of an interview with a third party to collect information

In its judgment, the ECJ rejects the distinction made by the GC between formal and informal interviews conducted by the EC, on the basis of which the EC would have to respect the formalities imposed by Regulation 1/2003 only for formal interviews. On the contrary, the ECJ found that the EC has to record in full any interview the purpose of which is to collect information relating to the subject matter of an investigation, after having warned the person concerned. The ECJ further affirmed that granting access to an internal note containing a brief summary of the topics addressed during the interview but without any indication of the content of the discussions or the nature of the information provided is not sufficient to remedy the lack of a record of the interview. These procedural shortcomings, however, had no impact on the GC's judgment, as the ECJ considered, conforming to settled case law on the consequences of violation of substantial formalities, that:

a the Commission did not make any use of the information obtained during the interview; and

b Intel could not establish that the information provided by the interviewed person contains exculpatory evidence, the non-disclosure of which would have influenced to its detriment the course of the procedure.

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