## 1. Introduction

The year 2017 will be remembered as one of the most challenging years for the American tech companies, as their activity has been under the microscope of the European Commission. Most notably, the EU competition watchdog has repeatedly accused the Big-Tech companies of breaching EU Law and hindering competition within the internal market (i.e. *Apple*, *Facebook*, *Amazon*).

The *Google* case, where the Commission has imposed a record fine of 2.4 billion € on the company for abusing its dominant position within the online search market, seems to be only the latest example of the focus provided by antitrust authorities on Big-Tech companies.

Even though these fines represent a drop into the ocean for these companies' revenues, the Commission's fining decisions are obviously appealed before the EU courts, sometimes causing untold consequences.

On 6 September 2017, the Court of Justice of the European Union (ECJ) has ruled the Intel Corporation/Commission case (*C-413/14*), where it has decided to set aside the 1.06 € billion fine previously imposed on the company for abuse of dominance, and to refer the case to the lower court for further evaluations.

This ruling could represent a cornerstone for the application of EU antitrust rules. Most notably, this case highlights the move from the ECJ's traditionally restrictive approach on loyalty rebates to a more lenient one, which requires the analysis of the economic effects produced by such a conduct prior to declare it unlawful.

Due to the significant relevance of the ruling, it seems worth to provide a detailed analysis of this case-law.

## 2. The Commission's assessment

In 2009, the European Commission had imposed a fine on Intel Corporation for abuse of dominance within the internal market, namely for carrying out illegal conducts that could exclude competitors from the market for computer chips, called x86 central processing units (CPUs).

According to the Commission, the company had put in place anti-competitive practices from late 2002 to the end of 2007, when Intel held approximately 70% market share of the worldwide CPU's market and leveraged its position to hinder its main competitor, Advanced Micro Devices (AMD).

The Commission's scrutiny revealed that Intel infringed EU law by awarding loyalty rebates to its own clients. This practice can be identified as the agreement through which a dominant undertaking grants specific discounts to purchasers if they buy all or most of a customer's requirements. The unlawfulness of this conduct has been disputed on several cases before the EU courts, especially for alleged infringements of Article 102 TFEU and abusive behaviours.

In the case at stake, the company used to grant conditional rebates to the giants of computers producing (such as Acer, Dell, HP, Lenovo). Most notably, Intel awarded rebates on condition that these computer producers purchased exclusively or almost exclusively Intel CPUs, excluding its main competitor from the market and infringing article 102 (i) TFEU.

The Commission's assessment found that Intel's illegal practices went even further, as the company used to pay a major retailer of the market, Media Saturn Holding, without purchasing any product from it but simply to harm AMD business. These payments were granted on condition that this retailer limited the distribution or postponed the sale of AMD products in the market, infringing Article 102 (ii) TFEU due to a restriction of consumers' freedom of choice.

Furthermore, even though the Commission was not obliged by law, it applied the 'as-efficient-competitor' test. This test refers to a hypothetical competitor, which is deemed to

be as efficient as the dominant undertaking, to verify the capability of the rebates to foreclose an equally efficient competitor. The test contributed to demonstrate the rebates applied by Intel were capable of having or likely to have foreclosure effects, which further underlined the unlawfulness of the conduct pursued.

Thus, on 13 May 2009 the European antitrust authority imposed a fine of 1.06 billion € on Intel Corporation, which was based on the duration and the gravity of the infringement, as well as the 2007 Intel turnover in the European Economic Area. Moreover, it ordered the company to refrain from pursuing these illegal conducts.

### 3. The General Court decision: loyalty rebates as *per se* illegal practices

The Commission assessment on the Intel's conducts has been based on the guidelines provided by the ECJ throughout its most relevant case law on loyalty rebates.

Most notably, the approach of the General Court (GC) has always been very restrictive, and it has been underlined since its earliest decisions. Since the *Hoffmann – La Roche* case in 1979, the GC has provided a thorough assessment on dominant companies rebate schemes that may be abusive, distinguishing between quantitative and exclusivity rebates.

The Court has stressed that exclusivity rebates «are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market». Furthermore, «the fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers» (para 89).

Due to the harmful effects these conducts generally produce on consumers and competitors, the Court has concluded that this kind of rebates, whenever they are granted by a dominant undertaking, can be identified as abusive without the need of evaluating the presence of a foreclosure effect to its competitors.

This conclusion has been the legal basis for the following judgments on the same issue. For instance, the *Post Danmark II*ruling has been consistent with the latter decision, as the GC identified loyalty rebates as *per se* anticompetitive practices, presuming their unlawfulness irrespective of its effects.

Here, the Court has once again stressed that even though the GC has deployed the 'as-efficient competitor' test to assess the exclusionary effects of certain abusive conducts (*France Telecom v Commission*, C-202/07; *Post Danmark I*, C-209/10), nor Article 102 TFEU nor the EU Courts case-law deliver a legal obligation to apply this test to assess the abusive effect of a dominant undertaking rebated scheme. Rather, «the as-efficient-competitor test must be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme» (Post Danmark II, para. 61).

These judgments have remarkably influenced the 2014 decision of the GC to reject the appeal and uphold the Commission's fine against *Intel*. Most notably, the GC has affirmed that loyalty rebates granted by a dominant undertaking are, by their very nature, capable of restricting competition and breaching Article 102 TFEU, therefore they can be identified as *per se* unlawful conducts without the need to carry out any test over the effects they produce on competition.

However, the most recent decision on the case by the ECJ seems to rewrite the rules on rebate schemes of dominant undertakings, revisiting more than 40 years of jurisprudence over abusive conducts.

**4. The ECJ's reasoning: towards an effect-based approach on exclusivity rebates?**

The ECJ has evaluated the first ground of the appeal brought by Intel, namely the jurisdiction of the Commission to punish the company for its anti-competitive conducts.

The ECJ has applied the 'qualified effects doctrine' arisen during the *Gencor* case, which establishes the extraterritorial application of EU Law. Most notably, this doctrine empowers

the Commission to apply Article 101 and 102 TFEU whereas an anti-competitive conduct may have an immediate, substantial and foreseeable effect within the EEA. Since the conduct pursued by Intel had the potential to impair the Single Market, the European Commission was found to have jurisdiction and punish Intel's conducts.

While the first ground of appeal has been rejected, the following lines of the decision at stake have completely reversed the established Court's approach on loyalty rebates. Most notably, the ECJ has set aside the decision of the lower court for not providing a full market analysis and a detailed assessment on the effects of the rebates applied.

Even though the GC had confirmed the Commission's argumentation on the *per se* unlawfulness of loyalty rebates, the competition watchdog had nevertheless based its fining decision on the results of its 'as-efficient-competitor' test, which highlighted the anti-competitiveness of the conduct pursued.

Despite the GC had not considered the results of the test, the latter played a major role in the Commission's assessment on the foreclosure effects of the rebates. Thus, the GC should have also examined the supporting evidence provided by the concerned undertaking to prove the contrary, which however had not occurred. According to the ECJ, the GC erred in law by failing to assess the rebate scheme in light of all the circumstances of the case.

Furthermore, the Court has stressed that the analysis of a rebate scheme must cover «the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market» (Intel appeal, para. 139).

Finally, the ECJ has stressed that «the analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified», therefore it has

referred the case to the GC to assess whether the conduct at stake was capable of restricting competition.

**5. Conclusions**

This judgment is significantly relevant for the application of Article 102 TFEU, as it overrules the denial of *de minimis* defences for rebate schemes previously established during the Post Danmark II case.

This approach seems to be recalled also by the most *relevant doctrine*, which considers conditional rebates of dominant undertakings as a category that cannot be simply identified as a "by object" illegal conduct. Most notably, this presumption tends to undermine the efficiencies and the pro-competitive effects that may be provided by rebate schemes, and may not be consistent with the application of Article 102 TFEU.

It must not be forgotten that the goal of competition law is to guarantee and protect the interests of consumers, which always prevail over the competitors' ones, even if the competition within a market may risks being controlled by a dominant firm.

In conclusion, this judgment represents a further step towards the introduction of a *de minimis* doctrine for Article 102 TFEU. The latter would put the abuse of dominance on a level playing field with other areas of competition law (both the EU Merger Regulation and Article 101 TFEU require the assessment of appreciable effects in order to be applicable), without however undermining the rule that exclusivity rebates are presumed to be illegal unless objectively justified.