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Exclusive dealing after Intel, Qualcomm and Google (Android) – a farewell to formalistic analysis?

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INTRODUCTION

- Exclusive dealing: exclusive purchasing and conditional rebates. Traditionally a strict approach (e.g. *Hoffmann-La Roche*, paragraph 89), sometimes simplified as "dominant position + exclusivity clause/rebate = abuse".

- Article 102 Enforcement Priorities Guidance (2009), §§ 32-46: Commission intends to take "more economic" approach, including testing coverage of abuse, evidence of *actual* foreclosure, whether the dominant firm is an unavoidable trading partner, the duration of any exclusive deal and, for "price-based exclusionary conduct", whether competition from "as-efficient competitors" is hampered.

- Focus today: three exclusive dealing decisions adopted, appealed, and ruled upon since the 2009 guidance: *Intel*, *Qualcomm* and *Google (Android)*. We also touch on the *Google (AdSense)*, *Unilever Italia* and *Servizio* cases.

- Goal: to identify common themes and answer whether *Intel* is restricted to conditional rebates or of wider application.

INTEL (COURT OF JUSTICE)

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- CoJ "clarified" its *Hoffmann-La Roche* judgment: conditional rebates may be an abuse, but if the dominant firm submits evidence that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the Commission must analyse:
  - the extent of the undertaking's dominant position on the relevant market;
  - the share of the market covered by the challenged practice;
  - the conditions and arrangements for granting the rebates in question, their duration and their amount; and
  - the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.
- To answer arguments around objective justification and efficiencies and carry out the necessary balancing of the favourable and unfavourable effects of the practice on competition, the decision must contain an analysis of the intrinsic capacity of the practice to foreclose competitors which are at least as efficient as the dominant undertaking.
- If the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments challenging the Commission's findings on the foreclosure capability of the rebate concerned.

HOW HAS INTEL SUBSEQUENTLY BEEN INTERPRETED BY THE COMMISSION?

- Google Android decision (2018): exclusivity **payments** are presumed to be abusive, but if the dominant firm seeks to rebut that presumption, *Intel* applies.

- However, Google AdSense decision (2019): Commission does not extend *Intel* to exclusivity **clauses**: "*The Court of Justice's judgment in Intel has clarified the Hoffmann-La Roche case law only where the exclusivity obligation of a customer of the dominant undertaking is undertaken in consideration of the grant of a rebate*".

- *Where, however, as in this case, the exclusivity obligation of a customer of the dominant undertaking is stipulated without further qualification, that undertaking abuses its dominant position within the meaning of Article 102 of the Treaty, unless it demonstrates that: (i) such an exclusive supply obligation is objectively justified; or (i) the exclusionary effect arising from such an exclusive supply obligation, which is disadvantageous for competition, is counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.*

- *This is consistent with the fact that, all other things being equal, an exclusive supply obligation constitutes a **greater obstacle** to access to the market than exclusivity rebates. An exclusive supply obligation deprives a customer of the possibility to switch any of its requirements to a competitor of the dominant undertaking whereas exclusivity rebates deprive a customer of the rebate associated with the exclusivity condition if it switches part of its requirements to a competitor of the dominant undertaking."*

HOW HAS INTEL SUBSEQUENTLY BEEN INTERPRETED BY THE COMMISSION? (2)

- In *Broadcom (Interim Measures)*, the Commission held that the legal test established in Intel would not be applicable to Broadcom's conduct, even if such conduct were limited to the provision of advantages conditional on exclusivity. According to the Commission, this is because the advantages provided for in Broadcom's agreements were not only limited to rebates, but also included non-price related advantages.

- However, a series of judgments and rulings in 2022 calls this approach into question.

INTEL (GENERAL COURT, JANUARY 2022)

- On remittal, the General Court held that in its decision, the Commission had committed "*an error of law in taking as a starting point the premiss that, in essence, the Hoffman-La Roche case-law allowed it simply to find that the rebates at issue infringed Article 102 TFEU on the ground that they were by their very nature abusive, without necessarily having to take account of the capability of those rebates to restrict competition*".

- Reviewing the AEC test as carried out by the Commission in the decision, the General Court found several flaws in the Commission's approach. For example, the Commission did not dispel doubts around whether it had used the right contestable share for Dell, it failed to take account of certain relevant months for HP and NEC, and had not proven that one of two agreements with NEC was conditional on exclusivity.

QUALCOMM (GENERAL COURT, JUNE 2022)

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- General Court does not distinguish between rebates on one hand and exclusivity payments on the other. The Commission is under a duty to carry out an analysis of the foreclosure capacity of the conduct at issue of competitors that are at least as efficient as the dominant company, provided the dominant company has submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition.

- The Commission **failed to take into account all the relevant circumstances**, including that Apple had no technical alternative to Qualcomm's LTE chipsets (but did rely on this circumstance to reject Qualcomm's critical margin analysis). It could not therefore conclude that Qualcomm's payments had reduced Apple's incentives to switch to Qualcomm's competitors for all of its requirements. The fact that Apple bought LTE chipsets from Qualcomm and that its competitors were unable to meet Apple's technical requirements could fall within competition on the merits and not an anticompetitive foreclosure effect.

- Characterising the payments concerned as exclusive payments was **not sufficient** to conclude that those payments constituted an abuse of a dominant position.

GOOGLE ANDROID (GENERAL COURT, SEPTEMBER 2022)

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- Case involving restrictions imposed by Google on Android OEMs and mobile network operators: pre-installation requirements; requirements not to sell devices running versions of Android OS not approved by Google, and revenue share agreements. Commission upheld on first and second restrictions.

- With respect to revenue share agreements, Commission found that these amounted to exclusivity payments. It held these are presumed unlawful, but since Google had submitted a rebuttal, the Commission had analysed their capacity to restrict competition, in particular by assessing their market coverage and conducting an AEC test.

- Court agreed that the agreements amounted to exclusivity payments and that *Intel* applies: if dominant firm submits that its conduct was not capable of restricting competition, Commission must analyse capacity to restrict competition on the merits in the light of all the relevant circumstances, including market coverage and capacity to foreclose competitors at least as efficient as dominant firm.

GOOGLE ANDROID (GENERAL COURT, SEPTEMBER 2022) (2)

- However, the Court found that the evidence did not support the Commission's finding that the agreements covered "a significant part" of the national markets for general search services. (In fact, the agreements covered less than 5% of the market defined by the Commission).

- With respect to the AEC test, the Court confirmed this is a "useful" way of assessing the capacity of a practice to foreclose competitors which are at least as efficient as the dominant undertaking. For exclusivity payments, the test must assess whether an as efficient competitor would have been capable of matching or exceeding the payments.

- The AEC test carried out by the Commission contained several errors of reasoning, calculating the wrong contestable share and making errors with respect to various variables including the costs attributable to an as-efficient competitor, its ability to obtain pre-installation of its app, and the likely revenues. The AEC test therefore did not support the finding of abuse in the decision.

EXCLUSIVITY CLAUSES: CAN THE COMMISSION'S INTERPRETATION OF INTEL HOLD?

- Google AdSense: exclusivity clauses present a "*greater obstacle*" than rebates.
- However, note the CoJ in *Servizio* (a case involving a non-pricing practice) paragraphs 51-58:
  - Where a dominant undertaking submits, during the administrative procedure and with supporting evidence, that its conduct was not capable of restricting competition, the competition authority concerned is required to examine whether, in the particular circumstances, the conduct in question was indeed capable of doing so (*Intel*, 138-140). The authority must pay due attention to the observations thus submitted by that undertaking.
  - The authority does not need to prove *actual* effects. Absence of actual effects, even if the practices were in place for a long time, can stem from other causes like changes on the relevant market.
  - However, absence of actual effects can constitute evidence that the conduct in question was not capable of producing the alleged exclusionary effects. That evidence must, however, be supplemented by evidence that the absence of actual effects was the consequence of the conduct's inability to produce such effects.
  - The inability of a hypothetical as-efficient competitor to replicate the conduct of the undertaking in a dominant position constitutes, in respect of exclusionary practices, one of the criteria which make it possible to determine whether that conduct must be regarded as being based on the use of means which come within the scope of normal competition

EXCLUSIVITY CLAUSES: CAN THE COMMISSION'S INTERPRETATION OF INTEL HOLD? (2)

- Note also the A-G Opinion in *Unilever Italia* (a case involving exclusivity clauses in distribution agreements, Opinion not yet available in English):
  - AGCM had held that it could disregard the economic analyses of Unilever because they were irrelevant to the infringement. First instance Italian court agreed and held that *Intel* only applies to conditional rebates, not exclusivity clauses.
  - A-G: the obligation on the authority to prove the capacity of the practice to foreclose competitors which are at least as efficient as the dominant undertaking if that undertaking submits evidence to the contrary in the administrative phase, applies *regardless of the type of abuse* at issue (paragraph 71). This follows from the wording in paragraphs 137-140 of *Intel*. It also follows from a purposive interpretation of Article 102, which is not there to stop dominant firms from obtaining a dominant firm through competition on the merits, nor to protect less-efficient competitors. Article 102 is a provision that prevents dominant firms from adopting practices that could foreclose as-efficient rivals. That prohibition applies regardless of whether the practice concerns a "pricing abuse".
  - A-G: if the dominant firm submits on the basis of evidence that its conduct cannot restrict competition on the basis of an AEC test, the authority must test whether this is the case, and must establish anti-competitive effects that are not purely hypothetical in nature by reference to competitors that are as-efficient.
  - The authority cannot simply dismiss economic evidence as irrelevant and must take it into account in its analysis of the capacity of the practices to foreclose as-efficient competitors. If the authority considers that the analytical approach by the dominant firm is not relevant to the abuse, it must explain why this is so.

WHAT LEGAL TEST WOULD APPLY TO EXCLUSIVITY CLAUSES UNDER 102?

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- How does one test capability to foreclose an "as efficient competitor" in cases not involving a pricing abuse?

- Three options:
  - Competition authority is required to consider "all the relevant circumstances" (including the evidence submitted by the dominant firm) to decide whether the conduct is capable of restricting competition (*Google Shopping*)
  - Competition authority is **also** required to show that the practice is capable of excluding as efficient competitors (A-G in *Unilever Italia*)
  - Competition authority is required to show that the practice is capable of excluding as efficient competitors **and** analyse the factors in para. 139 of Intel, at least those not specific to rebates

- Combining bullets 1 + 2 may be enough, but a prudent competition authority may want to do all three.

PROCEDURAL ISSUES

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- In *Qualcomm*, the Commission had included in its SO an abuse both on the market for LTE chipsets and on the market for UMTS chipsets, i.e., an abuse covering two markets.

- In response, Qualcomm had submitted a critical margin analysis concerning both types of chipsets, seeking to prove that an as-efficient competitor could have competed with Qualcomm to supply LTE and UMTS chipsets to Apple (because that competitor would have been in a position to offer a price covering its costs while also being able to compensate Apple for the loss of the payments concerned).

- In the decision, the Commission found Qualcomm had abused its dominant position only on the LTE chipsets market. It rejected Qualcomm's critical margin analysis and presented a "revised" analysis which continued to rely on data concerning both LTE and UMTS chipsets. The Commission therefore "presented, examined and revised a critical margin analysis … which was not, or was no longer, relevant to the abuse found in that decision".

- According to the Court, this infringed Qualcomm's rights of defence. The Commission cannot change the scope of the conduct under review after the SO is issued, particularly when the this would impact on the economic data that would be used in the economic analysis.

PROCEDURAL ISSUES (2)

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- In Google (Android), the Court criticised the Commission for failing to conduct a hearing with Google after substantially supplementing the substance and scope of the approach it had originally taken in the SO. According to the Court, the value of a hearing was all the more apparent given the deficiencies in the Commission's application of the AEC test.

- [Runs counter to the approach proposed in the Guidance?]

MORE THAN A DECADE AFTER THE GUIDANCE, WHERE ARE WE?

- Seems inevitable that a formalistic approach (dominance + exclusivity clause = abuse) is unlikely to be accepted going forward.
- That is legally and economically sound. A per se prohibition on exclusivity clauses (only to be saved by objective necessity) is not consistent with the more economic approach to Article 102 that the Commission itself introduced in 2009.
- Procedurally, gains can still be made to allow more scrutiny which will ultimately make findings more robust.
- Relatively succinct analysis should still be possible for long-term exclusivity with significant coverage, particularly where firm is an unavoidable trading partner.

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THANK YOU

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