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Rebates: What Can Companies Learn from the Intel Decision?

As has already been widely reported, on 13 May 2009 the European Commission (the "Commission") announced that it had fined Intel Corporation €1.06 billion ($1.441 billion) for violating EC Treaty antitrust rules (Article 82 EC Treaty) on abuse of a dominant market position by engaging in illegal anticompetitive practices to exclude competitors from the market for Central Processing Unit computer chips (CPUs).

The Commission's more than 500 page decision is not currently available, and will not be for some time, but a few elements relevant to a company's consideration of its rebates scheme can be discerned from the information that is currently available. For a company that might be deemed to hold a dominant market position, determining whether or not a rebate it offers is anticompetitive is particularly challenging and complicated, despite the recent guidance published by the Commission.

Is the Benchmark Set?

The *Intel* decision is important because it is the first case since the Commission's publication of the principles and concepts of analysis of exploitative abuse contained in the Commission's 2008 Guidance on this subject.[1] The Guidance was long in gestation, having formally commenced as a Staff Discussion paper, published in 2005. Since 2005 there has been much comment, often critical, of a number of elements of the Staff Discussion paper, including rebates.

The Commission reached a decision in 2006 in *Prokent/Tomra*[2] in which Tomra, a supplier of reverse vending machines, was fined Euro 24 million for exploitative abuse of a dominant position, including its rebates scheme. However, there is not enough substantive description in the Tomra Decision to allow us to recognise it as being a case in which the analysis in the Guidance was fully pre-figured. Some elements of the Tomra decision will serve as a reference, in particular the calculation of the "effective price."

The open question, until the *Intel* decision is published, is whether or not it will be used as a practical example of the application of the Guidance and as the key precedent from here on. However, even if this is the case, the *Intel* precedent might not be solid, at least for the moment, given that Intel has already announced that it intends to appeal the Decision.[3]

More Dominant, More Effects

Dominance is clearly a pre-condition for a breach of Article 82 EC Treaty. Many who submitted comments on the Staff Discussion paper urged the Commission to provide companies with a safe harbour. The Commission declined to do so in the Guidance, but did state that "The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market." Nonetheless, the Commission in the next sentence also stated that "However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission."

Some cases are perhaps obvious that there is a dominant position, or at least create a rebuttable presumption that dominance exists on the basis of the market share alone. Leading examples of such cases include Tetra Pak — 91.8 percent for aseptic carton filling machines; BPB Industries plc — 96 percent plasterboard; Microsoft — 60 percent for work group server operating systems; and Tomra — 80/90 percent for reverse vending machines. But there are also non-obvious cases. Leading examples include United Brands — 40/45 percent for the supply of bananas; and British Airways — 39.7 percent for air travel agency services.

What the Guidance brings out, and this is also emphasized on the effects analysis it introduces, is that, using both quantitative and qualitative factors, there is no black-or-white causal effect that flows from a preliminary determination that there is or might be a dominant position. There are shades of dominance, and the stronger the position of dominance, the more likely there will be effects.

The market share held by Intel was determined to be at least 70 percent. That is a market position enjoyed by few corporations, and such a share ensured that anticompetitive foreclosure from its rebates scheme was, as a starting presumption, likely to have a real and material effect on the relevant market. Companies with a percentage market share in the low 40s could have the same level and type of rebate and legitimately conclude that there is no anticompetitive foreclosure. Consequently, a conclusion that a company should never have a rebate scheme like Intel's could be erroneous, because the degree of dominance held by the company might be different and, therefore, lead to different levels of effects on competition.

Not Just a Rebate

Intel's rebates could only be taken advantage of by customers if they also met forms of exclusive or partially-exclusive purchasing obligations. Of the four customers concerned, one had to buy 100 percent of its requirements for the relevant products from Intel; for the second customer it was 95 percent of its requirements for its business desktop computers; for the third it was 80 percent of its needs for its desktop and notebook computers; and for the fourth it was all of its requirements for its notebook computers.

A conclusion from the *Intel* decision is that companies should take care before basing their rebates on the condition of exclusivity or partial exclusivity. It is also clear from the *Intel* decision that while such conditions might not be explicit, the Commission has the ability to determine the true position through "dawn-raids," or from evidence provided by third parties — including, of course, the supplier's customers! As regards non-explicit (partial) exclusivity, the level of the "non-contestable share" — as is discussed below — should be included in the analysis.

It's Not a Contest

A crucial element for the proper analysis of a company's rebate schemes is the determination of the "contestable share" and "non-contestable share." As the Commission expresses it, "a conditional rebate granted by a dominant undertaking may enable it to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes)."[4] In the Guidance, the Commission offers the argument that, "competitors may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier."[5]

In the *Intel* case, the relevant product, CPUs and the Intel x86 generation in particular, is an essential input for all kinds of computers. The x86 architecture is ubiquitous among desktop and notebook computers and has a growing majority share among servers and workstations. Given this market environment, and the Commission's statement in its press release on the *Intel* case that AMD was essentially Intel's only competitor in the market, it would seem reasonable to suggest that the Commission determined for Intel's customers that the "non-contestable share" was very high, and the "contestable share" was very low. There may be only a few companies that, even though dominant, operate in an environment like Intel's. Consequently, a conclusion that a company should never have a rebate scheme like Intel's could be unfounded, because the levels of contestable and non-contestable share for a company could be quite different to those faced by Intel's customers; this difference can lead to different (and arguably lesser) effects on competition on the relevant product market.

What Next?

As mentioned above, the Commission's decision in the *Intel* case may not be publicly available for quite some time. Indeed, if Intel lodges an appeal before the European Court in Luxembourg, the Commission decision will not become final at least for a couple of years.

However, this decision sent a strong message about the Commission's determination to enhance its enforcement in dominance cases. Considering that in the last ten years there have been only a few cases on rebates besides *Intel*, and that the Commission has

recently adopted its Guidance on this subject following a lengthy consultation period, there will be little room for dominant or presumably dominant companies to argue that the law is not clear on rebates and try to avoid higher fines for illegal conduct. Therefore, these companies need to consider their options and proactively seek to ensure that their rebate schemes and generally their conduct is compatible with the Guidance provided by the Commission.

Endnotes

1 Communication from the Commission; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings; Brussels 9.2.2009; C(2009) 864 final.

2 Case COMP/E-1/38.113 – Prokent-Tomra; 29.03.2006; OJ C(2009) 734.

3 Tomra has also appealed the Decision against it.

4 Guidance, paragraph 39.

5 Guidance, paragraph 36.

For more information on the Intel *decision, or any other matter raised in this Client Update, please contact the following lawyers.*

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