Advocate General Wahl has delivered his opinion in the case of Intel v Commission, rejecting the controversial finding of the General Court that exclusivity rebates are per se abuses under Article 102 of the TFEU. If adopted by the European Court of Justice, AG Wahl’s reasoning would be good news for undertakings in a dominant position. The opinion also contains interesting discussions regarding the European Commission’s jurisdiction and its evidence gathering powers.

In 2009 the Commission fined Intel €1.06 billion for using exclusivity rebates and other illegal practices designed to exclude competitors from the market for x86 central processing units (CPUs). Intel appealed the Commission’s decision to the General Court (GC), challenging both the decision and the size of the fine, but the GC dismissed the appeal in 2014. Intel then brought a further appeal to the European Court of Justice (ECJ). In his opinion, AG Wahl emphatically rejects the majority of the GC’s findings, upholding five of Intel’s six grounds of appeal, and encourages the ECJ to set aside the GC’s judgment and refer the case back to the GC.

Exclusivity rebates are not per se abusive

The GC’s judgment had determined that rebates which are conditional on a customer obtaining all or most of its requirements from a dominant firm (exclusivity rebates) are per se abuses of Article 102 and that it is not therefore necessary for the Commission to consider whether the rebates have anti-competitive effects in order to reach a finding of infringement.

AG Wahl rejects this approach noting that since the objectives of EU competition law are the protection of consumers and the promotion of efficiency “anticompetitive effects...assume crucial importance”. Otherwise “conduct which, on occasion, is simply not capable of restricting competition would be caught by a blanket prohibition...[this] would also risk catching and penalising pro-competitive conduct”.

In AG Wahl’s view, while the Commission is entitled to presume that exclusivity rebates are unlawful, it cannot reach an infringement decision without examining “all the circumstances” of a particular case to check that the presumption is valid. Relevant factors include the proportion of the market affected by the rebates and the duration of the relevant contracts.
Where that analysis reveals facts that are potentially inconsistent with the presumption of illegality the Commission must go on to perform a full effects analysis.

While AG Wahl’s approach would not in theory require a full effects analysis in all exclusivity rebate cases, he sets a high bar for the “all the circumstances” analysis which in practice the Commission might struggle to meet. He suggests that the presumption of illegality does not hold when there is any doubt as to its validity and that it is not enough for the Commission to be satisfied that anti-competitive effects are more likely than not.

Extra-territoriality and the Commission’s jurisdiction

Intel also questioned how the GC had come to the conclusion that the Commission had jurisdiction to determine whether agreements with a Chinese manufacturer amounted to an abuse. These agreements concerned sales of CPUs manufactured and sold outside the EEA, for incorporation into computers manufactured in China.

AG Wahl encourages the ECJ to take the opportunity to remove the uncertainty that has existed since its judgment in the Wood Pulp case in 1988 and confirm that the Commission has jurisdiction to enforce EU competition law not only against conduct which is implemented in the EU but also against conduct which has “foreseeable, immediate and substantial” effects in the EU. AG Wahl also emphasises that implementation in the EU requires that the dominant undertaking itself implements the relevant conduct in the EU; jurisdiction on the basis of implementation is not established simply because that undertaking’s counterparty has an EU presence.

The Commission must record interviews

AG Wahl also criticises the Commission’s failure to provide a proper record of a meeting held during the course of its investigation.

The Commission had initially denied that the interview with a senior Dell executive took place. However, the Hearing Officer later acknowledged that there was a note to the file concerning the meeting, which set out at a high level the topics discussed.

“[d]evising, by way of judicial construction, a new tool for the Commission to conduct its investigations would allow it to circumvent the rules that the legislator has put in place”

AG Wahl rejects the Commission’s contention that it was not obliged to provide a record of the meeting. The GC had ruled that the requirement to record interviews contained in Commission Regulation No 773/2004 applies only to “formal” interviews. AG Wahl notes that the legislation does not distinguish between formal and informal interviews and describes the GC’s approach as “highly problematic”. He cautions the ECJ against allowing the Commission to avoid the requirement to record by designating an interview as “informal”, noting that the requirement “ ensures, on the one hand, that the undertakings suspected of infringing EU competition rules can organise their defence and, on the other hand, that the EU Courts can review, ex post, whether the Commission employed its investigative powers within the confines of the law”. 

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In AG Wahl’s view the later note to the file did not cure this procedural irregularity. As this note only provided a high-level overview of the topics discussed, it did not sufficiently reflect what might have been said at the meeting. As a result, there existed no adequate record of the meeting and Intel could not be sure whether there was any evidence arising from the meeting which could have helped its defence.

Next steps and comment

AG Wahl recommends that the case be referred back to the GC in order for it to consider Intel’s appeal for a second time.

Whilst this opinion is authoritative, it is not binding on the ECJ and so AG Wahl’s suggestions might not be followed. In particular, AG Wahl contradicts the GC’s judgment fairly extensively and so, even if the ECJ does indeed uphold Intel’s appeal, it is quite possible that his reasoning will not be followed in its entirety.

It therefore remains to be seen whether exclusivity rebates will continue to be treated as per se infringements of Article 102. Until the GC’s judgment in Intel in 2014, a number of cases, particularly those dealing with exclusionary pricing abuses, as well as the Commission’s enforcement priorities guidance published in 2009, had indicated that Article 102 jurisprudence was moving away from a form-based approach towards a more effects-based approach for all types of abuse. It will be interesting to see whether the ECJ follows AG Wahl’s opinion and confirms this trend or whether it backs the GC’s per se approach, notwithstanding the downsides of such a blanket prohibition as highlighted by AG Wahl.

It will also be interesting to see whether the ECJ follows AG Wahl’s opinion in relation to the Commission’s obligation to record interviews conducted for the purpose of infringement proceedings. It seems difficult to disagree with AG Wahl from the perspective of protecting the rights of defence of undertakings accused of anti-competitive behaviour, but the ECJ may wish to preserve flexibility for the Commission.

Similarly, AG Wahl’s suggestion that the ECJ clarifies the Commission’s jurisdiction in relation to extra-territorial conduct seems entirely sensible. However, several Advocates General have already advised the ECJ to adopt an effects-based approach to jurisdiction in the field of competition law but to date the ECJ has neither endorsed nor expressly rejected that approach.

The ECJ’s judgment is expected in 2017.