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The *Intel* judgment of the CJEU and its impact for EU competition law

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AGENDA

- The traditional case-law of the CJEU on conditional rebates
- The Guidance Paper and the AEC test
- The “as efficient competitor” test in practice
- The Commission decision against Intel
- The General Court judgment in *Intel*
- The CJEU judgment in *Intel*
- The implications of the judgment

THE TRADITIONAL CASE-LAW OF THE CJEU ON CONDITIONAL REBATES

- Historically, the CJEU drew a distinction between three categories of rebates (based on their form):
  - **Quantity rebates**, i.e. rebates linked solely to the volume of purchases made from a dominant firm, are generally considered not to have the foreclosure effect prohibited by Article 102 TFEU. (*Hoffman–La Roche)*
  - **Exclusive rebates**, i.e. rebates that are conditional on the customer's obtaining all or most of its requirement from the dominant firm, are "incompatible with the objective of undistorted competition within the common market" as they "are designed to remove and restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market." (*Hoffman–La Roche)*
  - **Other rebates**, which are not directly linked to a condition of exclusive or quasi-exclusive supply from the dominant firm, but which may have a fidelity-building effect, such as for instance target rebates, should lead to an examination of "all the circumstances, particularly the criteria and rules governing the grant of the rebate." (*Michelin I & II, British Airways)*

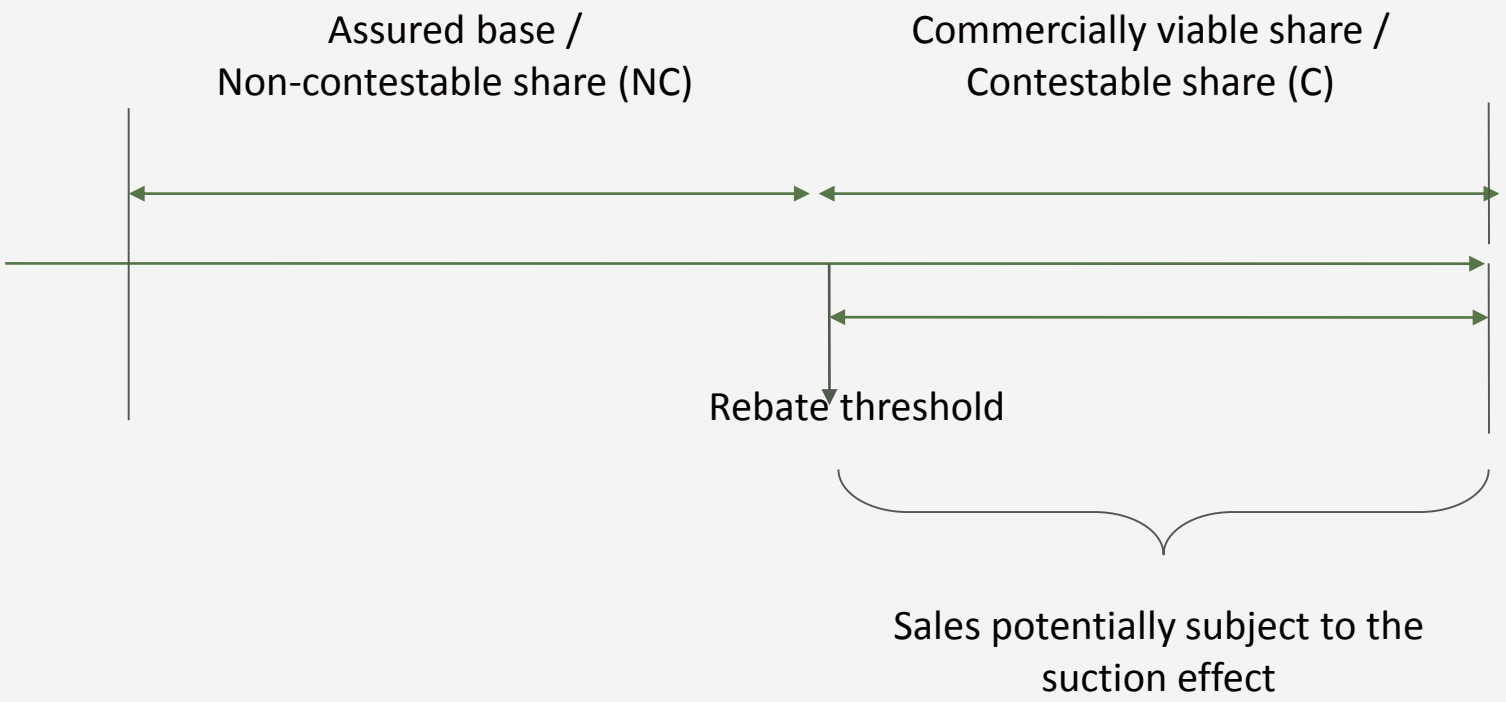
THE GUIDANCE PAPER OF THE COMMISSION (2009)

- Proposes to use “effects-based” approach to assessment of alleged exclusionary practices
- Does not distinguish rebates based on form: speak of “conditional rebates”
- Applies an “as efficient competitor” (AEC) test to conditional rebates:
  - Incremental rebates: pure predation test
  - Retroactive rebates: discount attribution test (whereby totality of rebate is applied to the contestable part of the demand to see whether effective price is above costs).
  - Bundled rebates: Also applies a discount-attribution test.
- Dominant firm should be allowed to invoke efficiencies, but what can on efficiencies can be successfully invoked is not clear.
- But the Guidance Paper is not a statement of the law and **is without prejudice of the case-law of the CJEU**.

COMMISSION DECISION OF 9 MAY 2009 AGAINST INTEL

- Commission claimed that it was not bound by the Guidance Paper as it was a priority-setting document that "does not apply to proceedings that had already been initiated before it was published, such as this case"
- Instead, applied *Hoffman-La Roche*'s quasi-*per se* rule of illegality to Intel's rebates
- Referring to *British Airways* and *Michelin II*, the Commission also noted that for establishing an infringement of Article 102 TFEU "it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned"
- Applied a discount attribution test to Intel's rebates, but makes clear it did not have to do it to establish a breach of Article 102 TFEU

THE AEC TEST IN PRACTICE



THE JUDGMENT OF THE GENERAL COURT (1)

Judgment distinguishes between three categories of rebates

- Volume rebates: presumptively legal
- Fidelity rebates: quasi-*per se* illegal
- Other categories of rebates: you have to look at “all the circumstances”

The rebates granted to Dell, HP, NEC and Lenovo are rebates falling within the second category

- No need to examine the circumstances of the case
- Foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where that “access is made more difficult.”
- Where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute *“additional interference with the structure of competition on the market.”*

THE JUDGMENT OF THE GENERAL COURT (2)

- The amount and the duration of the rebates are irrelevant.

  The "possible smallness of the parts of the market which are concerned by the practices at issue is not a relevant argument" as when the conduct at stake is adopted by a dominant firm "on a market where for this reason the structure of competition has already been weakened, any further weakening of the structure of competition may constitute an abuse of a dominant position."

- In order to find anti-competitive effects "it is not necessary that a rebate system force an as-efficient competitor to charge 'negative' prices, that is to say prices lower than the cost price."

- An AEC test "only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult." Thus, even a positive result to this test would not be capable of ruling out the presence of a foreclosure effect.

INTENSE DEBATE WITHIN THE COMMISSION

Not all Commission officials shared similar views on the *Intel* judgment

Wouter Wils ("The judgment of the EU General Court in Intel and the so-called 'more economic approach' to abuse of dominance" – 2014)

- "Article 102 TFEU and the other EU competition rules thus **protect the competitive process as such**. ... Any economic approach that is based on the assumption that the objective to be pursued is something other than a system of undistorted competition as part of the internal market is not fit for the purpose of interpreting Article 102 TFEU."
- "Instead of categorizing exclusivity rebates as a form of exclusivity, the proponents of the so-called 'more economic approach' would rather categorize exclusivity rebates as "price-based exclusionary conduct", together with predatory pricing. This alternative categorization is clearly inferior." (emphasis added)

Luc Peeperkorn ("Conditional pricing: Why the General Court is wrong in Intel (and what the Court of Justice can do to rebalance the assessment of rebates" – 2015):

- "The **aim of competition policy enforcement is to enhance consumer welfare by protecting competition**. This implies that competitors are only protected to the extent that they contribute to consumer welfare."
- "This paper provides arguments why the General Court is wrong in denying the relevance of the effects-based approach in general, and the "as efficient competitor test" in particular, for the assessment of exclusivity rebates." (emphasis added)

THE JUDGMENT OF THE CJEU (2017) (1)

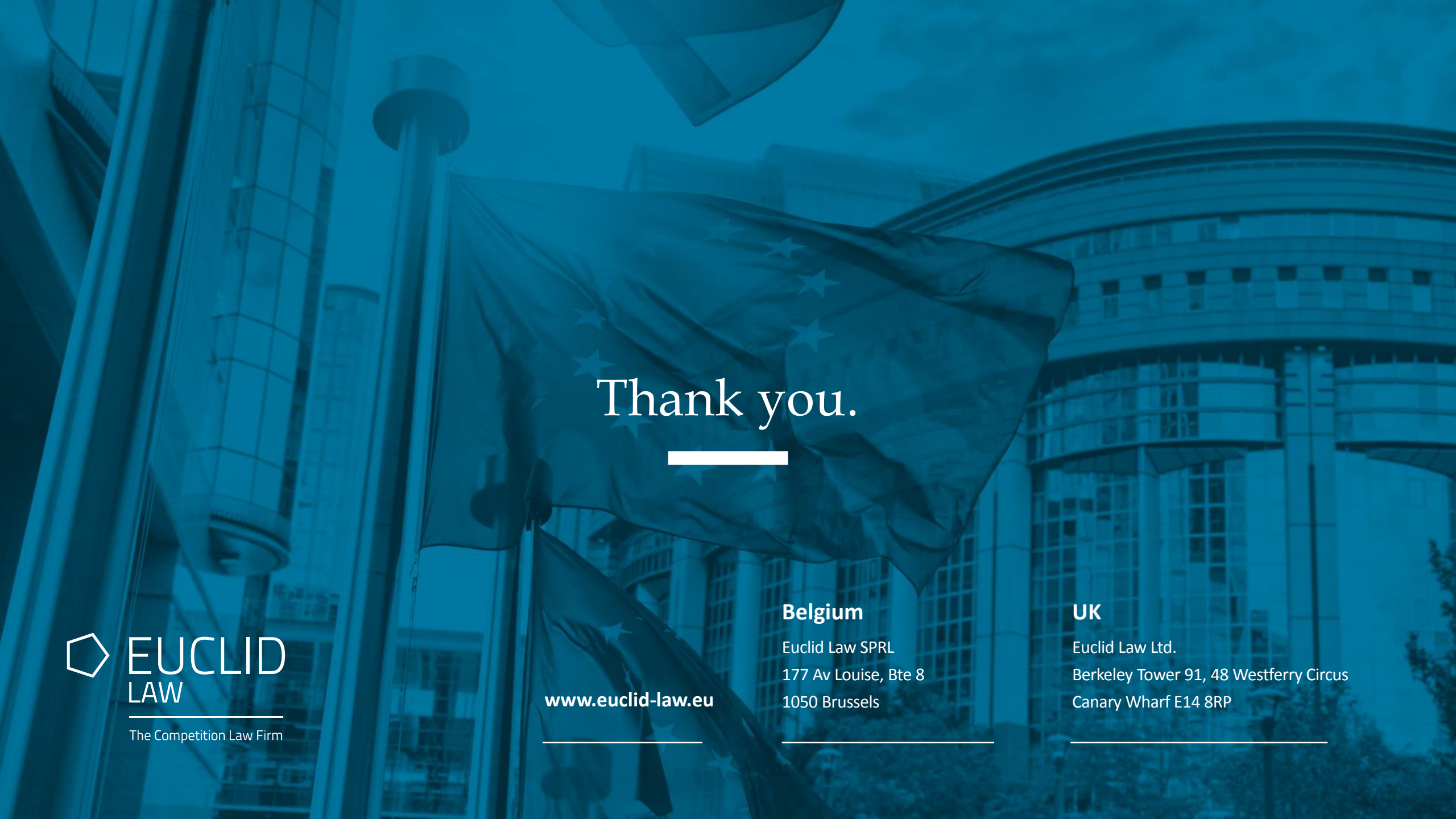
- "The *Hoffman-La Roche* case-law (which was generally understood as imposing a per se rule of illegality on exclusive rebates) "**must be further clarified** in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.
- "In that case, the Commission is not only required to analyse, first, 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.
- "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**. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, **may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer**." (paras. 138-140, emphasis added)

THE JUDGMENT OF THE CJEU (2)

- "If, in a decision finding a rebate scheme abusive, **the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments** seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.
- In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position, **it nevertheless carried out an in-depth examination of those circumstances …, a very detailed analysis of the AEC test**, which led it to conclude … that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.
- It follows that, **in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.**
- In those circumstances**, the General Court was required to examine all of Intel's arguments concerning that test**." (paras. 141-144, emphasis added)

IMPLICATIONS OF THE CJEU JUDGMENT

- The *per se* rule approach applied to exclusive rebates no longer applies.
- In rebates case, the Commission should look at "all circumstances of the case."
- The Commission is not bound to carry out AEC test, but if it performs one, then the General Court has to address the claims made by the appellant.
- The dominant firm can always invoke efficiencies and the Commission must weigh them against the restrictions of competition.
- This strengthens the importance of the Guidance Paper and the effects-based approach and could have an impact beyond price-related abuses.
- This will also strengthen the judicial review process against Commission decisions and encourage dominant firms to fight their case rather than negotiating commitments with the Commission even when they think the Commission has no case.
- The judgement of the CJEU has therefore been received very positively by EU competition law specialists.



Thank you.

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