

Where does EU law stand on abuse of dominance: lessons from key high-tech cases of the 21st century

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Introduction

This article provides a historical perspective on some of the main European Union abuse of dominance cases in the hi-tech sector from this century. It then seeks to draw lessons from those cases about where the law in the EU stands on abuse of dominance on a number of key issues, as well as what unanswered questions remain for the future, both as regards case enforcement itself and the interplay between that and regulation.

The next section sets the scene by outlining the policy context and some of the key issues at stake, both in terms of antitrust's analytical framework, and its role and very purpose. Then, the article provides an overview of a number of the main EU abuse of dominance cases in the hi-tech sector from this century, and in light of those, a description of where we stand and where more clarification may come in the future. The article concludes by placing the debate in the broader policy context of the role and effectiveness of antitrust and its interplay with regulation.

¹ The views expressed in this article are the personal views of the author and do not necessarily represent the view of Gibson Dunn or any of its clients.

Scene setter

Enforcement in the field of unilateral conduct (in the EU, ‘abuse of dominance’ under Article 102 of the Treaty on the Functioning of the European Union (TFEU)) has been one of the most debated and controversial areas of competition law throughout this century, particularly in the hi-tech sector. Significant attention has been devoted to this topic both because of a number of high-profile cases that have been brought (or not brought) on both sides of the Atlantic, and because of more general issues of both principle and practice that these cases have raised.

Some of these issues are at the heart of the ongoing debate about the role and relevance of antitrust. For example, at a time when many question whether the consumer welfare standard is an appropriate policy goal for antitrust, one key issue is how harm in individual abuse of dominance cases should be demonstrated, both in terms of the standard of proof and the very meaning of ‘effects’.

In the field of hi-tech,² other questions include whether antitrusts analytical framework is fit for purpose, either as regards whether it can deal with conceptual issues, such as two-sided markets, free digital goods and the increasing role of data, or whether the types of conduct to be analysed can fit into the typology of ‘traditional’ conduct dealt with in the past.

Beyond these issues are some more systemic or even existential ones about what the purpose and role of antitrust should be and whether antitrust is quick or effective enough to deal with issues arising in individual cases, or even broader, more structural issues. The interplay with regulation is of particular relevance here, not least given the recent adoption of the EU Digital Markets Act and given other, similar regulatory initiatives around the world.

Key cases

There has been a broad range of abuse of dominance cases brought by the European Commission (the ‘Commission’) this century, both in the hi-tech sector and beyond. This article focuses on a subset of those – *Microsoft*, *Intel*, *Qualcomm* and the *Google* cases – as these illustrate a number of the main themes that are pertinent today in any analysis of Article 102.

Microsoft case and the effects-based approach

EU competition policy arguably made its presence truly felt on the global stage for the first time at the beginning of this century through two cases: the prohibition by the Commission of the proposed General Electric (GE)/Honeywell merger (which

2 This is admittedly an imprecise label as what most people consider ‘hi-tech’ in fact spans many different products and markets with characteristics that are not necessarily uniform.

had been deemed unproblematic in the United States) in 2001 and its abuse of dominance prohibition decision against Microsoft in 2004. Some questioned the EU's legitimacy to deal with the *Microsoft* case given that similar issues were being examined by the US Department of Justice. Such an argument was more political than legal because there is no doubt that the Commission has jurisdiction over conduct that has an effect in the European Economic Area (EEA), regardless of the nationality of the companies concerned, and this is an argument that is rarely heard today.

On the substance though, there were many voices, particularly emanating from the US, arguing that there was little or no place for antitrust intervention in the hi-tech sector because these were markets characterised by rapid innovation and where there could not be any sustained positions of dominance because products would be quickly displaced by other products through technological progress. There was also a questioning of whether the 'traditional' typologies of abuse of the *Microsoft* case (refusal to supply and tying) could readily be applied to digital markets given that the main relevant precedents related, inter alia, to TV listings (*Magill*), nails and nail guns (*Hilti*) and aseptic and non-aseptic cartons (*Tetra Pak II*).

Despite the political and policy debates at the time, it seems difficult to argue that the 300+ page decision did not contain a detailed analysis of the effects of the conduct at stake, whether or not one agreed with the specifics of that analysis. This included findings in relation to the different parameters of competition, the link between the conduct and market developments, incentives to innovate and incentives to develop applications to alternative platforms. The 2007 General Court judgment upholding the decision went into similar detail.

Notwithstanding this 'effects-based' approach in the decision, in part against a backdrop of criticism that the EU had had a historical 'per se'³ approach to abuse of dominance, after *Microsoft*, the Commission took the decision to formally enshrine an effects-based approach as its policy on abuse of dominance. This was encapsulated in the 2009 Guidance on Enforcement Priorities in relation to Article 102 (the 'Guidance Paper').⁴

This document 'set[s] out the enforcement priorities that will guide the Commission's action in applying Article 82 [Article 102] to exclusionary conduct

3 Throughout this article, 'per se' is used as a term of convenience to describe conduct where anti-competitive effects are presumed from the nature of the conduct itself, and where an individual effects analysis does not have to be carried out. Even for this type of conduct, a company may seek to objectively justify it and such arguments must be analysed by the Commission before it can conclude that there has been an abuse of dominance. Strictly speaking therefore, there is no 'per se' abuse under Article 102. Some commentators describe this type of conduct as an 'abuse by object', seeking to make an analogy with Article 101 of the TFEU.

4 Which followed the 2005 DG Comp Staff Discussion Paper on Article 102.

by dominant undertakings. Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct'. As such, while not being a statement of the law or constituting guidelines, it set out the Commission's vision of Article 102. Effects and consumer welfare were central to this vision, with the Guidance Paper stressing that the Commission's focus would be on conduct that is most harmful to consumers.

The Guidance Paper also made clear that dominant companies should be able to compete hard on the merits, and that this could mean the exit from the market of companies that delivered less to consumers in terms of price, choice, quality and innovation. In this regard, in the context of the individual Guidance Paper sections on different types of abuse, the section on exclusivity rebates introduced the as-efficient competitor (AEC) test as the main way in which the Commission would seek to determine whether an exclusivity rebate was foreclosing. This is a price-cost test that examines whether a hypothetical competitor as efficient as the dominant company would be able to compensate customers for the rebates they would lose if they breach the dominant company's exclusivity condition and switch part of their purchases to a competitor. The key to the foreclosure mechanism of this test is that, on the one hand, if a customer breaches the exclusivity condition, it loses the rebate from the dominant company across the entirety of its purchases, whereas on the other hand, in any given purchase period, the share of its supplies potentially 'up for grabs' to a rival (the 'contestable share') is limited (ie, there is a non-contestable share that would go to the dominant company anyway). Accordingly, depending on the size of the contestable share, even if a competitor has exactly the same costs as the dominant company, it may need to price below cost to compensate the customer for the loss of the exclusivity rebate because that loss applies to all of its purchases, whereas the compensation that the rival has to offer is concentrated on the more limited contestable share. The dominant company therefore 'leverages' the non-contestable share (a reflection of its dominance) onto the contestable share.⁵

What is often misunderstood about the AEC test is that it is a combination of hypothetical and actual parameters: the hypothetical parameter is to assume a hypothetical company that has the same cost base as the dominant company, whereas the actual parameters depend on specific market evidence about how much

5 While as outlined, the Guidance Paper was not a statement of the law, the introduction of the AEC test was a departure from *The AEC principle (and test)*.

rebate would be lost by the customer if the exclusivity condition is breached and, crucially, on what each customer's contestable share is in any given purchase period.⁶

Exclusivity rebates cases (Intel and Qualcomm)

The *Intel* case took place in parallel with these policy developments. The core issue was rebates to customers of Intel's computer chips, which were conditioned on exclusivity or quasi-exclusivity.⁷ In its 2009 prohibition decision, the Commission invoked the long-standing 'per se' case law on exclusivity rebates from the Court of Justice of the European Union's (CJEU's) 1979 *Hoffmann-La-Roche* judgment, according to which, once it is established on the facts that there is an exclusivity rebate, the anti-competitive effects of the conduct are automatically presumed and a further individual effects analysis is not necessary.

Nevertheless, in a 500+ page decision, the Commission outlined two ways in which the conduct did have harmful effects, all the while making clear that this effects analysis was not legally necessary. The first such way was through a combination of different types of qualitative and quantitative evidence, including contemporaneous evidence, analysis of the nature and operation of the exclusivity rebates, the impact of those on customers' incentives, and the nature and importance of certain customers. The second such way was through a price-cost AEC test of the type that was outlined in the Guidance Paper.⁸ A significant part of the decision was devoted to this test. Based on parameters for each customer about how much its contestable share was and how much rebate would be lost if it breached the Intel exclusivity condition, the decision found that a hypothetical rival as efficient as Intel would need to price below cost to compensate for the loss of rebates over the contestable share of each customer, and hence that each such rebate led to anti-competitive foreclosure.

In its 2014 judgment, the General Court fully upheld the Commission decision. On the law, it confirmed the *Hoffmann-La-Roche* analysis that once exclusivity rebates were established on the facts, the anti-competitive effects of the conduct could be presumed, and that no further effects analysis was legally necessary. It nevertheless did examine, as an alternative analysis, the first of the two types of the decision's effects analyses referred to above and held that this also confirmed the foreclosing nature of the exclusivity rebates. It did not, however, even as an alternative analysis,

6 There was, and still is, not full consensus among economists about whether the AEC test's results lead to meaningful conclusions about the foreclosure potential of an exclusivity rebate. Some argue that more analysis of the market context is needed beyond each AEC test per customer, whereas others argue that even if the hypothetical AEC does not have to price below cost over the contestable share, an exclusivity rebate could still be foreclosing.

7 Intel denied on the facts that such exclusivity rebates existed.

8 The Guidance Paper did not apply to the case as it was adopted after the case had started.

examine the specifics of the decision's AEC test analysis, stating that such a test was not legally necessary.

The subsequent 2017 CJEU judgment set the General Court judgment aside and sent the decision back to the General Court for re-examination. In an important set of paragraphs applying to Article 102 in general, the CJEU reiterated language from other judgments (not least *Post Danmark I*), enshrining what could be called an 'as efficient competitor principle'⁹ according to which competition on the merits, including from dominant companies, could lead to the departure from the market or marginalisation of less efficient competitors. On the specifics of the exclusivity rebates at issue, the judgment 'clarified' the *Hoffmann-la-Roche* judgment by stating that where the dominant company submitted evidence during the administrative procedure that its conduct was not capable of harming competition, the Commission was required to conduct a specific analysis of the conduct concerned to determine whether the conduct was abusive according to certain criteria ('the paragraph 139 criteria'¹⁰). As regards the AEC test, without stating that this was legally necessary for an abuse to be demonstrated, the CJEU specified that, because in the specific case, the AEC test had formed an important part of the Commission's analysis and Intel had raised it as a point of appeal, the General Court needed to, inter alia, examine the specifics of the Commission's analysis in this regard.

It seems uncontroversial to say that in practice, the CJEU judgment was not merely a 'clarification' of *Hoffmann-La-Roche*, but a shift away from it; the Commission could no longer rely on a presumption that there were anti-competitive effects, but had to do an individual effects analysis if the company argued during the administrative procedure that its conduct was not foreclosing (which it will always do in practice).

In 2022, in its second judgment on the case, the General Court annulled the Commission decision. In a very detailed per customer analysis of how the AEC test had been carried out, it held that certain Commission factual findings in relation to the different parameters of the test (ie, contestable share and size of rebate foregone) could not be fully substantiated and that any doubt in this regard had to work in the favour of Intel. On this basis, all the decision's AEC analyses were dismissed. Moreover, the General Court also undertook an analysis of the Commission's 'other' effects analysis that it had endorsed in its first judgment. Under the paragraph 139 criteria, which had of course been set out by the CJEU

9 As opposed to the specific price-cost based AEC test for exclusivity rebates.

10 These parameters are outlined in para 139 of the judgment and are: (1) the extent of the company's dominant position; (2) the share of the market covered; (3) the conditions and arrangements for granting the rebates in question; (4) their duration and amount; and (5) the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant company.

after the decision had been adopted, it held that at least some of these had not been fully met, and hence that the decision should be annulled. The judgment is not the end of the story as the Commission has appealed it to the CJEU.¹¹

In between the CJEU's *Intel* judgment and the second General Court *Intel* judgment, the Commission in 2018 adopted another prohibition decision in relation to exclusivity rebates. This was against Qualcomm and concerned a written exclusivity rebate contract with Apple. It could be said that the Commission sought to learn the lessons of the Intel experience in that it did not do its own AEC test (but sought to rebut one brought by Qualcomm), and held that on the basis of an analysis of the circumstances of the case in line with the paragraph 139 criteria of the CJEU *Intel* judgment, there had been harm to competition and hence an abuse. However, this decision was also annulled by the General Court in June 2022. The judgment found that there were a number of procedural issues that were sufficient to warrant such an annulment, but it also found against the Commission on the substance of its effects analysis. In another detailed examination of the decision and the associated evidence, the General Court focused in particular on the decision's finding that the Qualcomm exclusivity rebate had reduced Apple's incentive to switch to Intel. It found fault both with the substance of the analysis in relation to the impact of the rebate on Apple's incentives and on the disconnect between the finding that the practice was held to foreclose competition in the whole market, whereas only a limited portion of Apple's supplies had in fact been up for grabs (and at a date after the beginning of the conduct).¹² The Commission declined to appeal the judgment, perhaps reasoning that the core issues of principle relating to exclusivity rebates would be addressed in its appeal of the second Intel judgment to the CJEU.

Google cases

No review of the major recent developments in relation to Article 102 would be complete without an examination of the three Google cases, which the Commission concluded by way of prohibition decision (*Google Shopping* in 2017, *Google Android* in 2018 and *Google AdSense* in 2019).

11 Few people could have predicted during the administrative procedure or the Guidance Paper that the case would still be 'live' in 2022 or indeed that on the substance, a consequence of the Commission's case and policy choice to promote the AEC test would mean that for a conduct that for decades had been 'per se', the decision would among other reasons have been annulled based on very specific findings on a customer's contestable share.

12 Whereas the Commission had argued that this was precisely the way that the foreclosure mechanism worked.

Google Shopping

In *Google Shopping*, the decision held that Google was dominant in general search and that in its general search results, Google treated its own comparison-shopping service more favourably compared to those of rivals by at the same time: (1) demoting the results of rivals; and (2) not subjecting its own comparison shopping service to such demotions, but rather giving it a prominent position at or near the top of the search results and a richer display. The finding of abuse relied on an effects analysis according to which Google's conduct did not constitute competition on the merits. The main elements in this regard were that traffic was key for comparison shopping services to compete effectively, that Google was an important source of traffic for them and that Google's conduct decreased traffic to competitors and increased traffic to Google. In this last respect, the decision found, based on different empirical data, that there was a link between visibility and format in Google's general search results and click-through behaviour: results that are higher and in a more visible format attracted significantly more clicks than those that are lower or beyond the first page.

One of the main issues, both during the administrative procedure and in the General Court appeal, was on the legal characterisation of the abuse and its implications for the effects analysis and the legal standard. The Commission held that the conduct was a classical leveraging abuse where, according to the parameters described above, Google used its dominance in one market (general search) to obtain an undue advantage in a neighbouring market (comparison shopping services), and that this harmed competition and did not constitute competition on the merits. By contrast, Google argued that the case was about rival comparison shopping services seeking to access its search results, that this was its property, and hence, that the case should be classified as a refusal to supply case. Accordingly, Google argued that the case should be assessed pursuant to the more stringent criteria of the CJEU *Bronner* judgment, which would, inter alia, require that the Commission demonstrate that Google was an essential facility, something that the decision had not done.

Interestingly, in its 2021 judgment, the General Court did hold that Google was akin to an essential facility and that search was an infrastructure. It nevertheless found that search was to be distinguished from other infrastructures, the value of which depends on the ability to protect their exclusive use, and that the rationale of a search engine is to be open to third-party results. As such, it held that it was a certain form of 'abnormality' for Google to favour its own results and that while the case did involve access, it was not a refusal to supply case. On this basis, it held that the case should not be assessed according to the *Bronner* effects standard and that the decision's effects analysis should be upheld.

It remains to be seen in Google's appeal to the CJEU whether these specific questions are relevant, but the judgment does illustrate an interesting theme that pervades many Article 102 cases of recent times (including beyond the hi-tech sphere), namely the importance or otherwise of whether conduct can be classified as refusal to supply and hence, what the relevant effects standard should be.

Google Android

The core theme of the *Google Android* decision is about how with the rapid growth of mobile internet, Google used Android as a vehicle to extend and protect its search dominance in the mobile space. There were three different types of abuse, namely: (1) the tying of Google Search and Google Chrome to the Play Store;¹³ (2) exclusivity rebates in the form of shares of advertising revenues paid to smartphone and tablet manufacturers and mobile network operators on condition that they exclusively pre-install Google Search; and (3) contractual restrictions which prevented smartphone and tablet manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android – so-called Android forks (the 'anti-fragmentation abuse'). The recent General Court judgment of September 2022 mainly upheld the Commission decision, with the exception of the abuse finding in relation to exclusivity rebates.

In relation to tying, the legal framework applied in the Commission decision was the same as that of *Hilti*, *Tetra Pak II* and *Microsoft*, and following the framework of the *Microsoft* case, the core of the analysis was that there was a significant pre-installation advantage resulting from the tie that could not be matched through alternative methods and that there was harm to competition in the respective tied markets of search and browser. The General Court judgment closely followed this framework and upheld the Commission's findings on the basis of a detailed examination of the evidence. One of the key battlegrounds of the case also related to claimed efficiencies, where Google argued that Android had brought significant benefits to the mobile ecosystem by providing the market with a free and popular product that was the only effective counterweight to Apple, and that by ensuring revenue for Google Search and Google Chrome, the ties allowed Google to monetise its investments in Android. In terms of the legal framework, Google essentially argued that by focusing only on one side of the market (ie, the harm to competition in the search and browser markets resulting from the tie), the Commission was ignoring the broader benefits on the other side(s) of the market (operating systems and app stores); this has echoes of the arguments in the US *Amex* case. The Commission maintained that there should first be an analysis of any harm to competition in the markets concerned arising from the tie

¹³ The tying of Google Chrome to Google Search was also found to be an abusive tie.

and that then, as part of the usual objective justification analysis, an assessment of the claimed efficiencies could be made on the facts. The General Court upheld this finding, confirming the decision's analysis that there were a number of other ways that Google could monetise the Android ecosystem.

In relation to exclusivity rebates, while the General Court found that these were an important element of factual context in assessing the foreclosing nature of the tying of search, it annulled this part of the Commission decision, holding that: (1) the Commission had not demonstrated that the market coverage of the practice was significant, as required by the *Intel* CJEU judgment; and (2) that there were a number of errors in the Commission's assessment in relation to the as efficient competitor-type test that it had carried out.

As regards the anti-fragmentation abuse, the Commission decision's finding of anti-competitive effects, upheld by the General Court, related to the direct foreclosure resulting from the contractual restriction prohibiting device manufacturers from installing an Android fork on any of their devices. Much of Google's argumentation again related to the claimed efficiencies of the practice, namely that the restrictions were necessary to prevent a 'fragmentation' of the Android ecosystem. In upholding the decision's rejection of these claims, the General Court held that Google had not factually substantiated its arguments and that whilst a prohibition to install Android forks was justified on those Android devices using Google proprietary apps and services, there was no such justification for Google's prohibition on device manufacturers to sell devices based on Android forks across all their devices (ie, also including those devices that did not pre-install Google proprietary apps and services).

Google AdSense

The *Google AdSense* case is probably the least discussed of the three Google cases. The decision concluded that various clauses in Google's contracts with third-party websites prevented or restricted Google's rivals from placing their search adverts on these websites. Beyond its specifics, the case raises interesting legal issues of its own, not least in relation to exclusivity. Here, the decision held that the CJEU *Intel* judgment requirement that an effects analysis be carried out to ascertain whether the conduct harms competition should only apply to exclusivity rebates rather than straight contractual exclusivity, reasoning that such exclusivity should be regarded as inherently more harmful than exclusivity rebates and that while *Hoffmann-La-Roche* applied to both exclusivity and exclusivity rebates, the paragraph 139 criteria of the CJEU *Intel* judgment only refer to exclusivity rebates. At the same time, the decision does conduct an effects analysis as a fallback (echoing the Commission's approach in the *Intel* decision). This specific legal issue is likely to be resolved by

the CJEU before the General Court rules in the *Google AdSense* case because it is one of the main aspects of the preliminary reference to the CJEU in the Italian *Unilever* case.

Where does Article 102 stand and what are the key issues for the future?

The cases outlined above are a subset of the abuse of dominance cases that have taken place across all sectors at EU level this century and of the abuse of dominance issues on which the CJEU has ruled through preliminary references from national courts in the EU. Nevertheless, they are, in my view, illustrative of where Article 102 stands on a number of core questions, as well as on what the key issues still to be resolved are.¹⁴ I have grouped these questions and issues into the three following categories below: (1) judicial review and the nature of effects analysis; (2) the AEC principle and test; and (3) the suitability of antitrust's analytical framework.

Judicial review and the nature of effects analysis

I did not subscribe to the view of some that there was previously very limited judicial review of Commission decisions under Article 102, but in any case, such a view appears more difficult to sustain today given the intense scrutiny that the EU courts undertake of Commission decisions and their increasing willingness to annul them. This applies more broadly when one considers judgments in different areas of competition law, with the EU courts also annulling high-profile Commission decisions in the fields of mergers and state aid.

It also seems increasingly clear that the Commission will consistently need to carry out a robust effects analysis in its Article 102 decisions. The shift of approach towards exclusivity rebates in the *Intel* case symbolises this point, although strictly speaking, there does seem to remain a limited space for conduct to be sanctioned without there needing to be an individual effects analysis; that is, suggested, *inter alia*, by the fact that the 'other' abuse in the *Intel* case, the so-called 'naked restrictions' conduct, was upheld.

Nevertheless, there has, in my view, been a discernible shift over time in the approach of the EU courts to be more demanding of what the Commission needs to demonstrate. This is reflected by judgments more routinely stressing that the effects analysis has to be carried out taking account of all the circumstances or all the relevant circumstances of a case, the frequent references in judgments to the purpose of Article 102 not being to protect less efficient competitors than the dominant company and the stress on dominant companies being allowed

¹⁴ Of course, there is a range of other cases not covered by this article that are also highly relevant in this context.

to compete on the merits. It is noteworthy that many of the EU courts' general principles in this regard echo the Commission's own policy pronouncements from previous years, in particular as regards the AEC principle.

What is also interesting is that all judgments still routinely invoke the 'special responsibility' of dominant companies to not impair undistorted competition and that dominance, while not being illegal, reflects a weakened state of competition. It is not clear, however, what practical relevance that jurisprudence has today. In the same vein, it seems questionable what practical relevance certain presumptions that still formally exist in the jurisprudence have in practice. A case in point is exclusivity rebates. Although, as described, in *Intel*, the CJEU did still refer to the long line of case law that started with *Hoffmann-La-Roche*, its 'clarification' of that case law means that, in practice, the Commission will need to do a robust effects analysis to demonstrate that the conduct is abusive.

The follow-on question to an effects analysis being required is what this means in practice, and what parameters should be used to judge if a particular conduct has had a harmful effect. This question also relates to the nature of the consumer welfare standard. In my view, whichever side one takes in the cases referred to in this article, the parameters of competition, such as whether there has been an impact on price, quality, choice and innovation, have generally served Article 102 well and can be assessed according to the evidence in each case, but these parameters do not have to entail the full story, for example, where privacy is increasingly a parameter of competition. That is not to say that the consumer welfare standard should become all-encompassing to include broader societal factors, but rather that the standard is flexible enough to adapt to modern market realities.

A related question is how far the Commission needs to go in outlining what actually happened in the market following a certain conduct and how much it should have to link this to the conduct itself. Legally, case law consistently stresses that 'actual effects' do not need to be demonstrated by the Commission to prove abuse, but that the requirement is rather 'potential effects', 'capability of foreclosure' or similar, and yet most, if not all, of the Commission's decisions this century do describe what actually happened in the market and seek to show a nexus between those developments and the conduct. Perhaps this is a question of labelling rather than anything more significant, but there is also a greater desire and willingness of the EU courts to examine the relevance of actual market developments in their assessment of Commission decisions, even if that is framed in terms of simply being informative of whether there could have been a 'potential effect' resulting from the conduct rather than a legal requirement in itself. This is understandable, particularly if a certain conduct has been taking place in the market for a number of years.

The AEC principle (and test)

The AEC principle, which was introduced as a concept by the Commission itself, is now a central feature of much Article 102 jurisprudence. The critical question, however, is how to interpret and apply both the general AEC principle, and where relevant, the specific price-cost based AEC test.

In my view, these concepts have developed in ways that few could have fully predicted at the time that they were being introduced by the Commission during the Guidance Paper process and *Intel* case. It now seems to be an accepted principle of jurisprudence that, in general, less efficient competitors than the dominant company should not be ‘worthy’ of the protection of Article 102 and that if such companies are foreclosed due to being less efficient, there should not, in principle, be a finding of abuse. But what does ‘less efficient’ mean in practice? If it means that the companies in question are not as efficient in cost terms as the dominant company (which is the concept of efficiency under the AEC price-cost test), but at the same time, a dominant company has inherent cost advantages over the rest of the market because of, for example, economies of scale, how can Article 102 be applied meaningfully?¹⁵ How does one reconcile such a notion with the fact that some CJEU judgments (eg *Post Denmark II*) stress that, in the specific case concerned, because the structure of the market made the emergence of an AEC practically impossible, the AEC test was of no relevance.

Perhaps one possible reconciliation lies in the language of the CJEU’s *Post Denmark I* and *Intel* judgments, which talks of ‘competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation’.¹⁶ This suggests that a constraint from a rival can be deemed ‘worthy of protection’ under Article 102 even if that rival is not as efficient in strict cost terms. The contrary interpretation would, in my view, be surprising, because, to take a hypothetical example, if there were a new entrant in a market that had a product that consumers valued in one way or another, it would mean that practices by a dominant company would escape the scrutiny of Article 102 if the new entrant did not have the same cost base as the dominant company. Nevertheless, these issues and concepts have not been fully developed in the case law and are therefore likely to be the source of dispute in future cases.

A more granular question is the role of the price-cost AEC test in exclusivity rebates cases. Every case is of course different, but the fact that the Commission’s

15 Indeed, the conceptual essence of the AEC test is that the dominant firm has an inherent advantage, which as described, allows it to leverage the part of a customer’s non-contestable requirements into the contestable part.

16 This echoes language from the Guidance Paper that talks of the possibility of competitors who deliver less to consumers in terms of price, choice, quality and innovation leaving the market.

abuse findings in relation to exclusivity rebates have now been annulled in three cases in no small part due to the AEC test is striking. What used to be regarded as an ‘abuse by object’ and what is perhaps one of the more intuitively straightforward mechanisms of foreclosure to describe has now seemingly become very difficult for the Commission to win on, and this at a time when it has been winning cases in relation to other abuses. The second *Intel* CJEU judgment will therefore be critical in providing further guidance on whether the way that the General Court has interpreted the first *Intel* CJEU judgment is indeed what the CJEU envisaged in practice.

Analytical framework

In my view, the cases referred to in this article, particularly the *Microsoft* and *Google* ‘digital’ cases, demonstrate that antitrust has flexible analytical tools that allow it to properly assess issues, such as network effects, two-sided markets, free products (at least at the point of use) and the increasing role of data.¹⁷ Even though Microsoft and Google took different positions to the Commission in their respective cases, they each engaged with the analytical framework set out by the Commission. The disagreements were therefore not about the suitability of the antitrust paradigm to be able to examine the issues at stake, but rather about the assessment of relevant evidence in the specific case at issue.

One noteworthy aspect that has changed over time, however, is that there are now significantly fewer voices that argue that there is very little role for antitrust in the hi-tech sector because of technological innovation, meaning that products will be quickly displaced and that entrenched market positions will be ephemeral. There is rather a more prevalent concern that factors such as network effects, lock-in and the relevance of data mean that certain markets are in fact more prone to dominance and hence, that there is a greater need for antitrust action.

Another question in this context is the typology of the conduct concerned, and whether this can fit with ‘traditional’ antitrust conduct used in the past. In fact, in large part, the types of conduct concerned in the cases described in this article, such as tying, exclusivity or exclusivity rebates, and contractual restrictions fall squarely within the categories of previous conduct in cases that were distinctly not in the hi-tech sphere, such as *Hilti* or *Tetra Pak II*. Even for conduct such as that in *Google Shopping*, the Commission held that, at least in general terms, Google’s favouring of its own comparison-shopping service fell squarely within an established framework because it was a leveraging abuse where dominance in one market was used to gain an undue advantage in

¹⁷ These are not ‘new’ phenomena analytically, even if, eg, the role and importance of data in digital markets is of a far greater magnitude than in the past.

an adjacent market. In one sense, though, the following question could be asked: why does any conduct need to be categorised according to a typology at all if, in any event, an effects analysis will be carried out in each case taking into account ‘all the relevant circumstances’? The counterargument to such a position, however, is that a coherent typology based on precedent is necessary and relevant for the purposes of predictability and the Commission being able to credibly impose deterrent fines.

Conclusion

The issues raised by the enforcement of Article 102 have become more complex in the course of this century, which is in part due to the increasing complexity of the markets that have been the subject of scrutiny in the hi-tech sphere. In parallel, the analysis of the issues concerned has become more sophisticated and rigorous as first, the Commission, and in turn, the EU Courts, have sought to demonstrate that a modern, effects-based approach can be successfully applied to Article 102.

At the same time, there is an increasing number of vocal critics who argue that, particularly in the field of hi-tech, antitrust has not done as much as it should have. Some of the criticisms argue that deficiencies remain in the way that issues are analysed, for example, that privacy and data considerations are not sufficiently incorporated in the analysis of market power and abuse. Other criticisms relate to the institutional efficiency of the system and argue that the remedies adopted in specific cases are too limited or come too late.

In my view, some of these criticisms demand too much of antitrust as a discipline; a sense of perspective about the purpose and nature of antitrust is important. Antitrust is a case-specific discipline where, on the basis of specific evidence relating to a practice or set of practices in an identified market, it is determined whether there is harm to competition and where, if so, a remedy is imposed to restore competition in the market concerned. Its aim is not in itself either to address general, structural issues in the market to the extent that these do not relate to the abusive conduct in question or to mandate specific market outcomes, and yet, in this increasingly mediatised enforcement era, there are often expectations in this direction.

To the extent that there are systemic or structural issues that need to be addressed, this should, in my view, be done via dedicated policy tools or through complementary regulation. Against this backdrop, the recently adopted EU Digital Markets Act, which comprises a set of legally binding ex ante obligations that must be complied with by digital gatekeepers, will be highly relevant in the markets concerned and will have a key role in shaping the competitive environment in

those markets. The way that this regulation works in practice will therefore be critical in determining whether the (in my view) often unjustified pressures on antitrust to do more in the hi-tech sector will be alleviated.

Author biography

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